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OF THE CASES REPORTED IN

ANNOTATED CASES

(American and English)

1918 C TO 1918 E

With Table of Cases Reported
and Index of the Annotations

EDWARD THOMPSON COMPANY
NORTHPORT, L. I., N. Y.
1919

BANCROFT-WHITNEY COMPANY
SAN FRANCISCO
1919

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ABSTRACT OF TITLE.

1. Liability of abstractor—Negligence in making search.—Ordinary care and diligence on the part of an abstractor, in performing the work for which he has been employed, require him to avail himself of every facility at hand in order to furnish his client an accurate and complete abstract of the records. For a failure so to do, he will be liable personally and upon his bond. *Crook v. Chilvers* (Neb.) 1918E-90. (Annotated)

2. The provisions in section 5623, Rev. St. 1913, which require the register of deeds to keep general grantor and grantee indexes of deeds and mortgages, and the provisions in section 5629, which make it the duty of the register of deeds, on receiving any conveyance or instrument affecting realty, to cause such conveyance or instrument to be entered upon a numerical index immediately after filing the same, are intended as checks, one upon the others, to insure accuracy in ascertaining the state of the records as to titles to real estate, and an abstractor is not justified in relying solely upon any one to the exclusion of the others. *Crook v. Chilvers* (Neb.) 1918E-90. (Annotated)

3. When an abstractor relies upon the numerical index alone to refer him to all entries upon the records affecting the title to the property which he is examining, he does so at his peril, unless the one employing him agrees that in the making of such abstract

he may rely upon said index alone for such information; and in such case his certificate to the abstract must clearly and unequivocally show his limited employment and investigation by reciting that such was the method pursued by him in making the abstract. *Crook v. Chilvers* (Neb.) 1918E-90. (Annotated)

4. Extent of liability.—Any person engaged in the business of compiling abstracts of title to real estate in this state, who furnishes an abstract to one by whom he is employed for that purpose, is chargeable with knowledge of the use to which such abstract will in all probability be devoted, and he thereby becomes liable under section 6277, Rev. St. 1913, for all damages sustained by reason of any defect in such abstract, not only to the party who employed him to make it, but also to all persons who may deal with such party in reliance upon the abstract so furnished. *Crook v. Chilvers* (Neb.) 1918E-90. (Annotated)

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1. Permanent disability.—An insured advanced in years, practically blind, lame, and a paralytic, is held to be permanently disabled under an insurance policy. *Eminent Household of Columbian Woodmen v. Bunch* (Miss.) 1918C-110.

2. The fact that an insured resigned his office of justice of the peace should not defeat his claim or impeach his testimony as to permanent disability: it being his right as well as his duty to resign if he could not perform the main duties of the office. *Eminent Household of Columbian Woodmen v. Bunch* (Miss.) 1918C-110. (Annotated)

3. Part continuance of insurance after accident.—A policy, giving half the total insurance for the loss of an eye with "the option to continue this covenant in force till death" when the other half will be paid, does not convert the remainder into an ordinary life policy and prevent recovery for further accidents. *Eminent Household of Columbian Woodmen v. Bunch* (Miss.) 1918C-110. (Annotated)

4. Where insured receives indemnity for loss of an eye and broken leg, he may still recover for permanent disability, although the lost eye and broken leg contribute to the permanent disability. *Eminent Household of Columbian Woodmen v. Bunch* (Miss.) 1918C-110.

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1. Sufficiency of complaint.—A complaint declaring upon a stated account that defendant promised to pay the amount found due upon a settlement is sufficient after verdict or judgment. *Smith v. Dwight* (Ore.) 1918D-563.

2. Necessity of pleading counter offsets.—In an action on an account, accruing to plaintiff under certain contracts, it is error to permit plaintiff, in the absence of counter offsets filed by him, to prove that the pay-

ments specified in defendant's bill of offsets were properly applicable to other items of plaintiff's account, not covered by its bill of particulars, under a proper construction of section 4, chapter 126, serial section 4824, Code 1913. *Parkersburg, etc. Sand Co. v. Smith* (W. Va.) 1918E-449.

3. Verified statement as prima facie evidence.—An action for the balance of agreed price of a course of instruction by correspondence, payable in instalments, is within Revisal 1905, § 1625, as amended by Pub. Laws 1917, c. 32, providing that, in an action on "an account for goods sold and delivered, for services rendered, and labor performed," a verified itemized statement of the account shall be admissible, and deemed prima facie evidence of its correctness. *La Salle Extension University v. Ogburn* (N. C.) 1918C-887.

4. Revisal 1905, § 1625, as amended by Pub. Laws 1917, c. 32, declaring a verified itemized statement sued on admissible as prima facie evidence of its correctness, applies in a trial subsequent to the act taking effect. *La Salle Extension University v. Ogburn* (N. C.) 1918C-887.

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Necessity of acknowledgment by wife to contracts relating to land, see **HUSBAND AND WIFE**, 1, 2, 15, 16.

1. Effect of defective acknowledgment.—Under Revisal 1905, § 2107, providing that no contract between a husband and wife during coverture shall be valid as to any part of the wife's realty for a longer time than three years unless in writing and duly proved as required for conveyances of land, and unless upon the examination of the wife apart from her husband, as required in the probate of deeds by femes covert, it shall appear to the satisfaction of the officer that the wife freely executed such contract and freely consented thereto at the time of her separate examination, and that the same is not unreasonable and injurious to her, where the certificate of probate filed with a wife's deed lacks a finding by the officer taking the probate that the conveyance was not unreasonable and not injurious to the wife, such deed is not valid to affect her realty. *Butler v. Butler* (N. C.) 1918E-638. (Annotated)

2. Trivial defects.—A certificate of acknowledgment will not be considered defective if there has been a substantial con-

pliance with the law. *Krichesky v. Hirshout* (Del.) 1918C-345.

3. Resort to instrument in aid of certificate.—Resort may be had to a deed to support the sufficiency of the certificate of acknowledgment thereof. *Krichesky v. Hirshout* (Del.) 1918C-345. (Annotated)

4. A certificate of acknowledgment to a deed executed by Mary M., certifying that "Catherine M., party to this indenture" acknowledged the deed, is sufficient where the notary public who certified to the acknowledgment was one of the attesting witnesses to the signing and sealing of the deed by Mary M., thus indicating that the word "Catherine" was a clerical mistake, since the certificate is sufficient if it appears, with reasonable certainty from the certificate and deed considered together, that the grantor in fact acknowledged the instrument. *Krichesky v. Hirshout* (Del.) 1918C-345.

(Annotated)

5. If such acknowledgment is defective, it is cured by 21 Del. Laws, c. 110, § 1, providing that the record of any deed dated prior to January 1, 1895, which was duly signed and sealed by the grantors notwithstanding such deed had not been properly acknowledged or the acknowledgment had not been taken and certified in conformity with law, shall be and thereby is made valid and effectual in law or by later statutes of like import. *Krichesky v. Hirshout* (Del.) 1918C-345.

6. Subsequent annexation of certificate.—Where a justice of the peace, in making a certificate of probate to a wife's conveyance of realty to her husband, omitted to state, as required by Revisal 1905, § 2107, that the conveyance was not unreasonable and not injurious to the wife, and where, in an attempt to rectify the omission nearly three years later and after the wife's death, a second certificate was procured from the justice, reading in part that he further certified that, "upon said examination, and upon a careful examination of the facts, causing the said execution, it doth appear to my satisfaction that the said [wife] freely executed the said deed and freely consented thereto, at the time of her said separate examination, and that the said conveyance is not unreasonable or injurious to her, the said [wife], which said conclusion I hereby certify as having been duly and carefully made concerning all the facts surrounding the execution and the cause thereof," such new certificate is insufficient to validate the deed, as not merely reducing to writing in the form of a certificate his prior official act, as the justice did not confine the certificate and adjudication to the examination of the wife separate and apart from her husband, but relied also on an examination of all the facts surrounding the execution of the deed, without stating that he ascertained such facts on the examination, concluding, "It doth appear to my satisfaction that the said conveyance is not unreasonable or injurious to her." *Butler v. Butler* (N. C.) 1918E-638.

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1. Abatement—Dissolution of corporate defendant.—The abatement of a suit pending against a corporation on appeal when such corporation was dissolved was prevented by the provisions of Tex. Rev. Stat. 1911, art. 1206, that upon dissolution of a corporation the president and directors shall be trustees of the creditors and stockholders, with full power to settle its affairs, and in the name of such corporation to collect all debts, compromise controversies, and maintain or defend judicial proceedings, and that the existence of every corporation may be continued for three years after its dissolution, for the purpose of enabling those charged with the duty to settle its affairs. *Pease v. Rathbun-Jones Engineering Co.* (U. S.) 1918C-1147.

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1. Party walls—Creation of right by implication.—A sale by the owner of two buildings, having party wall rights in the dividing wall, of one of them, passes the title subject to the right of the one retained to the use of the wall as a party wall. *Weadock v. Champe* (Mich.) 1918C-874.

2. An option on the Eagle Block, it and an adjoining block being separated by a twelve-inch wall into which the joists of both entered and which had been used by both as a party wall, is for the building and land on which it stands together with party wall rights. *Weadock v. Champe* (Mich.) 1918C-874. (Annotated)

3. Creation of rights by prescription.—A division wall between two buildings, having for the period of limitations been used for support of both buildings, becomes in effect a party wall, whether or not originally constructed as such, and without any express

agreement by the owners of the buildings.
Weadock v. Champe (Mich.) 1918C-874.

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1. Self-serving Declarations.

1. Letter.—A letter which a minister, sued for refusing communion to a member, attempted to hand to her before the communion began, forbidding her, till she did a certain thing, to partake, is not in the nature of a self-serving declaration. Carter v. Papineau (Mass.) 1918C-620.

2. Admissions and Declarations against Interest.

2. Copy of account.—Where a copy of an account is admitted to be correct by a party whose admissions are binding, such copy is admissible as part of the admitted transactions, and whether or not the books on which the account was based were accurately kept is immaterial. Scovill Mfg. Co. v. Cassidy (Ill.) 1918E-602.

3. Person by Whom Made.

a. Insured.

3. Declarations of insured are admissible against the beneficiary under mutual benefit insurance. Armstrong v. Modern Woodmen of America (Wash.) 1918E-263.

4. In suit on a fraternal benefit life policy, the testimony of a nurse stating an admission by the decedent that an abortion, which was a breach of the policy, was the cause of her last sickness, is admissible. Gilchrist

v. Mystic Workers, etc. (Mich.) 1918C-756.

5. In an action by a widow, the beneficiary named in a policy of accident insurance, defended under a provision of the policy on the ground of the insured's suicide, excepted from the risks, admissions by the insured against his interest in respect to his suicidal intent made while he had an interest in the policy, and while the beneficiary had no vested interest therein, are admissible against her in her suit on the policy. Rosman v. Travelers Ins. Co. (Md.) 1918C-1047. (Annotated)

6. In such action statements of the insured to physicians, not declaring that he had taken bichloride tablets with suicidal intent, are admissible; as it is a fact for the jury, in connection with the tardiness of his disclosure as to what he had taken after his repeated denials that he had taken anything. Rosman v. Travelers Ins. Co. (Md.) 1918C-1047. (Annotated)

b. Principal.

7. Statements or admissions, to be competent against guarantors, should be made during the continuance of the interest involved, and not after that interest has ceased. Scovill Mfg. Co. v. Cassidy (Ill.) 1918E-602.

8. Generally, where the declarations or admissions of the principal are made in the course of the performance of the business for which guarantor is bound, they are evidence against guarantor, but his subsequent declarations, having no direct connection with his acts in the business guaranteed, will not bind the guarantor. Scovill Mfg. Co. v. Cassidy (Ill.) 1918E-602.

9. In a suit on guaranty of a corporation's indebtedness, admissions as to the amount owed by the corporation to the guarantee, made by the president and general manager in charge of the corporation's business, in the regular course of the business, and being a part of the transactions and business between the guarantee and the corporation to which the guaranty contract applied, were competent as to such amount against the guarantors, although made when the corporation was insolvent to the knowledge of the parties, and shortly before the corporation was thrown into bankruptcy by petition of the guarantee. Scovill Mfg. Co. v. Cassidy (Ill.) 1918E-602.

4 Manner of Making.

a. Admission by Silence.

10. Failure to deny testimony.—In an action for deceit in the sale of a decedent's goods by defendant, as administrator, through an agent, defendant's failure at a former trial, at which he was a witness, to deny testimony given in his presence by plaintiffs and their witnesses as to statements made by defendant to plaintiffs that the goods had been so arranged in the stores as to give a fair representation, etc., which was material to the issue, is provable against defendant as an admission by silence and ac-

quiescence. *Harlow v. Perry* (Me.) 1918C-37. (Annotated)

11. Circumstances not calling for reply.—Evidence that a witness told a grantee what the grantor said about the deed, and that the grantee did not reply, is inadmissible in an action to recover the land under the deed; silence in such a case not implying assent. *Campbell v. Sigman* (N. C.) 1918C-40. (Annotated)

12. That a defendant remained silent when a clerk of codefendant stated, in response to a question asked by defendant as to whether she had a record of a patient's case, that she had, and that the patient was the teacher that defendant dropped iodine in her eye and put it out, is not admissible as an admission against defendant, where the clerk was not in the actual presence of defendant or the third person hearing the conversation, but was on the floor above, and where the conversation was carried on either through a speaking tube or up the stairway, and where codefendant was absent, and defendant could consider his own interests in the controversy, the rule being that silence is not an admission where the physical situation of the parties did not demand a denial, or the relationship of the person making the statement relied on was an employee of a third person who might have adverse interests, or where the statement was not one called for, but was purely voluntary and impertinent, and where the party remaining silent, notwithstanding the statement, could consider his own interests, and for that reason alone decline to reply. *State v. Ellison* (Mo.) 1918C-1.

b. Admissions in Pleadings.

13. Conclusiveness in favor of stranger.—Although admissions contained in a pleading of a party in a former action are admissible against him in a subsequent action between him and a stranger, the pleading does not conclusively establish the facts alleged therein, and is open to explanation or rebuttal. *Albright v. Albright* (N. M.) 1918E-542. (Annotated)

c. Admission in Offer to Compromise.

14. Admission of independent facts.—Admission by one of the parties of independent facts relating to plaintiff's claim, though made during the colloquium, or during a treaty for a compromise, are admissible in evidence, such admission not amounting to a proposition of compromise. *Parkersburg, etc., Sand Co. v. Smith* (W. V.) 1918E-449. (Annotated)

15. In a suit for damages from misrepresentations as to the acreage of land leased, it is error to exclude evidence as to a statement of fact made by the lessors at the time of negotiations with reference to the adjustment of the parties' differences. While an offer of compromise cannot be shown as being an admission of the party making the offer, any statement of fact made by him as such may be proved as an admission, though made

during the discussion of the compromise. *McNeer v. Norfleet* (Miss.) 1918E-436. (Annotated)

d. Res Gestae.

16. Statement of insured in last illness.—In suit on a fraternal benefit life policy, testimony of alleged statements of decedent made by her to her physicians and to one of them in the presence of a nurse during her last illness relating to the cause thereof is not admissible, as part of the res gestae. *Gilchrist v. Mystic Workers, etc.* (Mich.) 1918C-756.

17. Declaration at time of sale.—In an action for deceit in the sale of a stock of goods by defendant, the declaration of the agent who sold for defendant at the time of sale in reference to the condition of the goods is admissible as part of the res gestae accompanying the act of sale. *Harlow v. Perry* (Me.) 1918C-37.

18. Declarations of victim of homicide.—On a trial for murder, declarations of the deceased made under such circumstances as will raise the reasonable presumption that they are the spontaneous utterances of thought created by or springing out of the homicidal act, and made so soon thereafter as to exclude the presumption that they are the result of premeditation and design, and without knowledge of which the principal fact might not be properly understood, are admissible as part of the res gestae. *Morehead v. State* (Okla.) 1918C-416.

19. Declarations by a person whose throat was cut, and windpipe severed, and therefore speechless, made by signs in the presence of the defendant a few minutes after the wound was inflicted under circumstances that excluded the presumption that they were the result of premeditation and design are admissible as a part of the res gestae. *Poling v. State* (Okla.) 1918E-663.

20. Declaration of third person injured in altercation.—Where a third person fatally wounded by the accused's victim stated after the fight that he was dying, and then in response to a question said that the accused's victim shot him before the accused fired, it is held that his statement was inadmissible as part of the res gestae. *Holland v. State* (Ark.) 1918C-578.

5. Explaining and Contradicting Declarations.

21. Entire conversation where part is introduced.—Where contestant of a will puts in evidence a conversation with the propounder to the effect that the latter admitted the paper offered was not a valid will, as an admission by the propounder, the latter may give the entire conversation in explanation. *In re Clodfelter* (N. C.) 1918E-281.

22. In an action against an administrator for damages occasioned the purchasers of the decedent's goods sold for the administrator by an agent, the testimony of the agent as to his declaration at the time of sale in reference to the condition of the goods, containing immaterial testimony con-

cerning the value placed upon the property by appraisers, elicited because the witness was called upon to give his entire conversation with the buyers, is admissible. *Harlow v. Perry* (Me.) 1918C-37.

ADOPTION OF CHILDREN.

Recovery for death of adopted child, see DEATH BY WRONGFUL ACT, 6.

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Presumption of continuation of meretricious relationship, see EVIDENCE, 37.

ADVANCEMENTS.

1. Conversion of debt into advancement.—That notes are taken by a parent for sums advanced to his children indicates that he regarded the sums as debts, but he may convert them into advancements by his will. *Knight's Estate* (Pa.) 1918E-211.

2. Interest.—Advancements do not bear interest of themselves, but only by force of the testator's intent, clearly expressed in the will. *Knight's Estate* (Pa.) 1918E-211. (Annotated)

3. Where a testator who advanced certain sums to his children, taking notes therefor provides in his will that whatever debts might be owing him at his death should be taken into account in distributing the estate, the sums given to the children become advancements, and bear no interest, in the absence of a direction in the will therefor. *Knight's Estate* (Pa.) 1918E-211. (Annotated)

ADVERSE POSSESSION.

Delivery of warranty deed by grantor whose title rests on adverse possession as conveyance of good title, see VENDOR AND PURCHASER, 13.

Right of person having title by adverse possession to specific performance of contract for sale of land, see SPECIFIC PERFORMANCE, 2.

1. Permissive occupancy by grantor.—Evidence that plaintiff received a deed from defendant's intestate, that the intestate lived ten years after giving the deed, that the execution of the deed was known to all the children in interest, that the intestate paid taxes on the land and lived on the land, but paid no rent, and that he never demanded a reconveyance or reformation of the deed, in the absence of a showing of undue influence or fraud, is sufficient to sustain plaintiff's claim to the immediate right of possession of the land. *Campbell v. Sigmon* (N. C.) 1918C-40.

2. Extent of possession.—Two tracts having a common corner, making it possible to step from one to the other without crossing

any other tract, are "contiguous," within the rule that adverse possession of one of several tracts contiguous to each other, conveyed by a deed, though separately described, extends to all. *Parsons v. Dils* (Ky.) 1918E-796. (Annotated)

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1. Creation and Existence of Relation, 21.

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a. Of Agent to Principal, 21.

b. Of Principal to Agent:

(1) Compensation, 21.

(2) Damages for Breach of Contract 21.

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3. Rights, Duties and Liabilities as to Third Persons:

a. Authority of Agent in General:

(1) Duty to Ascertain Agent's Authority, 21.

(2) Conveyance of Real Estate, 22.

b. Ratification of Act of Agent, 22.

c. Notice to Agent as Notice to Principal, 22.

See ATTORNEYS; BROKERS; FACTORS.

Communications between principal and agent as privileged, see LIBEL AND SLANDER, 17-20.

Company furnishing fireworks to committee having charge of Fourth of July celebration as agent of committee, see THEATERS AND AMUSEMENTS, 8.

Declaration of agent as admissible against principal, see ADMISSIONS AND DECLARATIONS, 17.

Effect of war on power of attorney by alien, see ALIENS, 4.

Insurance agents and brokers, see INSURANCE, 1-7.

Joint liability of agent and principal for circulating libel, see LIBEL AND SLANDER, 33.

Liability of administrator for acts done by agent, see EXECUTORS AND ADMINISTRATORS, 13.

Liability of agent for renting of real property for injuries caused by negligence in care of premises, see LANDLORD AND TENANT, 9, 10.

Liability of beneficial association for torts of agent, see BENEFICIAL ASSOCIATIONS, 22.

Liability of corporation for tort of agent, see CORPORATIONS, 6.

Loss caused by agent's breach of duty as counterclaim in suit by agent for compensation, see SET-OFF AND COUNTERCLAIM, 1.

Nature of agency of partners, see PARTNERSHIP, 3.

1. Creation and Existence of Relation.

1. Automobile sales agency contract.—A provision in a contract for the sale of motorcars to a dealer for resale, whereby the seller reserves the right to reapportion the territory if in its opinion the dealer is not properly promoting sales, is designed only to secure to the seller proper effort on the part of the dealer, and does not warrant cancellation for other reasons. *Northwest Auto Co. v. Harmon* (U. S.) 1918E-461.

(Annotated)

2. In an action for damages for breach of a contract to furnish a dealer with motorcars for resale, the evidence is held to be insufficient to warrant the seller in canceling the contract on account of any lack of effort or inability, etc., on the part of plaintiff, to whom the contract was assigned. *Northwest Auto Co. v. Harmon* (U. S.) 1918E-461.

(Annotated)

3. In an action for damages for breach of contract to furnish a dealer with motorcars for resale, the evidence is held to warrant a finding that the seller was not warranted in canceling the contract, which had been assigned to plaintiff, on the ground of plaintiff's inability to carry it out. *Northwest Auto Co. v. Harmon* (U. S.) 1918E-461.

(Annotated)

4. Where a contract to furnish motorcars to a dealer for resale is conditioned upon the dealer's payment of a specified note, the seller's acceptance of payment in installments is binding, and precludes it from denying responsibility on the ground that the note was not paid as required. *Northwest Auto Co. v. Harmon* (U. S.) 1918E-461.

(Annotated)

5. Power of attorney—Revocation.—Where parties relinquishing lands within a forest reservation to the United States as a basis of lieu land selections sold their selections and executed powers of attorney authorizing the purchasers to select lieu lands in their names and authorizing the sale of the selected lands, such powers of attorney are powers with an interest and were irrevocable during the lifetime of the grantors. *State v. Hyde* (Ore.) 1918E-688.

2. Rights and Liabilities inter Se.

a. Of Agent to Principal.

6. Breach of duty by salesman—Carrying side line.—A traveling salesman, who engages to carry no side line of any nature, violates his contract as matter of law by carrying another line of clothing, in addition to defendant's, though he carries no samples or catalogue, and it is error to submit the question to the jury. *Merrimac Mfg. Co. v. Bibb* (Ark.) 1918C-951.

(Annotated)

7. In a suit for commissions by a traveling salesman who had engaged not to carry a side line of any nature whatever, the admission of testimony that to carry a side line a salesman must have samples or a catalogue of the goods he is selling, and that he had none, is improper, a "side line," in

commercial usage, being a line of goods sold or business followed in addition to one's principal articles or occupation. *Merrimac Mfg. Co. v. Bibb* (Ark.) 1918C-951.

(Annotated)

b. Of Principal to Agent.

(1) Compensation.

8. Misconduct of servant as defense.—Where an agent is guilty of fraud, dishonesty, and unfaithfulness in the transaction of his agency, such conduct is a bar to his recovery of compensation. *Neely v. Wilmore* (Ark.) 1918D-77.

9. Effect of appointment of guardian for principal.—Where one contracts to pay another a salary for a fixed term of years for managing an estate, but, before the expiration of such term, is made defendant in a suit for interdiction, in which, by an ex parte order of court, an administrator pro tem is appointed to manage the estate; and the manager, under the contract, acquiesces in such appointment, and without asserting any rights, assists the administrator, who is subsequently paid for the management, under a judgment obtained contradictorily with the former manager, who, by that time, has become the executor of the deceased owner of the estate, but who still asserts no claim under his contract, such manager cannot thereafter recover his salary for the balance of the term fixed by such contract. *Pons's Succession* (La.) 1918D-939.

(2) Damages for Breach of Contract.

10. Where defendant broke a contract to furnish motorcars to a dealer for resale, though the dealer had made contracts for the sale of more than half of the cars it was to receive, and could readily have disposed of the remainder, the profits on resale are so reasonably certain as to be recoverable as damages. *Northwest Auto Co. v. Harmon* (U. S.) 1918E-461.

(Annotated)

(3) Evidence.

11. In an action for breach of contract to furnish motorcars to a dealer for resale, which provided that it should be subject to the prior orders of other dealers, the evidence is held to be insufficient to show that defendant was justified in failing to furnish cars as agreed because of the prior orders of other dealers. *Northwest Auto Co. v. Harmon* (U. S.) 1918E-461.

(Annotated)

3. Rights, Duties and Liabilities as to Third Persons.

a. Authority of Agent in General.

(1) Duty to Ascertain Extent of Agent's Authority.

12. Duty of third person to make inquiry.—Where one contracts with an agent who apparently has a limited, rather than a general, authority, he is bound to make inquiry and ascertain the extent of the agent's

authority to act, for if one has notice that the authority is limited, he deals at his peril. *Cauman v. American Credit Indemnity Co. (Mass.)* 1918E-841.

13. Apparent scope of authority.—Where the relation of principal and agent is found to exist, the principal is responsible for the acts of the agent within the apparent scope of his authority, as an apparent general authority, conferred on an agent cannot be limited as to third persons when such limitation is not known to them. *Cauman v. American Credit Indemnity Co. (Mass.)* 1918E-841.

(2) Conveyance of Real Estate.

14. Effect of agent's deed as contract to convey.—An instrument in the form of a deed which has been defectively executed by an agent having authority to convey may operate as a contract to convey, and the agent's authority may be shown by parol. *Robinson v. Daughtry (N. C.)* 1918E-1186.

b. Ratification of Act of Agent.

15. Acceptance of benefits.—Allegations in a purchaser's action that the contract had not been made with defendant company, yet that defendant knew that plaintiff had made the contract with a certain person as its agent, and had relied upon his acts as those of the defendant, and had made payments accordingly, which defendant had received and applied to its own use, stated a cause of action to recover the amount paid. *Jones v. Ceres Invest. Co. (Colo.)* 1918C-429.

c. Notice to Agent as Notice to Principal.

16. "It is the duty of an agent to make known to his principal all facts concerning the service in which he is engaged that come to his knowledge in course of his employment, and this duty he is, in a subsequent action between his principal and a third person, conclusively presumed to have performed. This is the foundation of the rule, necessary to the public safety, that notice to an agent in the course of his employment is notice to his principal." *Modern Woodmen of America v. Colman*, 68 Neb. 660. *Modern Woodmen of America v. Berry (Neb.)* 1918D-302.

AGREED CASE.

Stipulation of facts on appeal, see **APPEAL AND ERROR**, 43.

ALIBI.

Proof, see **CRIMINAL LAW**, 14-20.

ALIENS.

1. Who are alien enemies.—A native of Austria-Hungary, with which country the United States is at war, though a resident of North Carolina, and regardless of the fact that he is guilty of no act or utterance

unfriendly to the United States, and is a quiet, law-abiding laborer, is an alien enemy. *Krachanake v. Acme Mfg. Co. (N. C.)* 1918E-340. (Annotated)

2. A ten year old child born in Canada of parents native to Austria-Hungary, residing with his parents in the United States, could sue for injuries by tort through his father as next friend, since the father was not a party in the legal sense but an officer appointed by the court to protect the interest of the son, and the United States follows the rule according to which nationality is primarily determined by the place of birth. *Krachanake v. Acme Mfg. Co. (N. C.)* 1918E-340.

3. Dissolution of partnership by war.—Where a partnership is dissolved by the outbreak of war, a partner continuing the business is liable to the alien copartner for such a share of the profits as represents his interest in the firm property used in continuing the business, though that liability cannot be enforced until the end of the war. *Stevenson v. Aktiengesellschaft Fur, etc. (Eng.)* 1918D-575.

4. Effect of removal to enemy country.—An irrevocable power of attorney to sell land given by a resident alien enemy is not rendered void by his subsequent removal to a residence in an enemy country. *Tingley v. Müller (Eng.)* 1918C-726. (Annotated)

5. Right of alien enemy to sue.—In view of the Presidents Proclamation No. 1417, as to rights of Austrian nationals, and the Trading with the Enemy Act (Act Cong. Oct. 6, 1917, c. 106, 40 Stat. L. 411; 1918 Supp. Fed. Stat. Ann. 846), defining an enemy as a person resident within the territory of any nation with which the United States is at war, a native of Austria-Hungary resident within the United States may sue for torts. *Krachanake v. Acme Mfg. Co. (N. C.)* 1918E-340. (Annotated)

6. Rules preventing certain enemy aliens from resorting to our courts do not prevail against a minor, the son of a native of Austria resident in the United States, since the money recovered will be in charge of a guardian appointed by the court, and cannot be removed from the state without the court's consent and so cannot be used in aid of the enemy. *Krachanake v. Acme Mfg. Co. (N. C.)* 1918E-340. (Annotated)

7. Naturalization—Application made before war.—Rev. St. § 2171 (6 Fed. St. Ann. 2d ed. 947), originally adopted at a time when the only application for naturalization was made in open court, provides that no subject of any country with which the United States are at war at the time of his application shall be admitted to citizenship. Act June 29, 1906, c. 3592, § 4, 34 Stat. 596 (6 Fed. St. Ann. 2d ed. 959), requires the applicant to make and file a petition in writing, and section 6 (6 Fed. St. Ann. 2d ed. 975) provides that final action thereon shall not be had until at least ninety days have elapsed after filing and posting the notice of such petition. It is held that the application is complete when the petition is filed, and the time of filing the petition is the

"time of his application," especially as section 2171 contains a further provision, now obsolete, for the naturalization of alien enemies entitled to naturalization on June 18, 1812, and hence a German subject filing his petition in January, 1917, was entitled to naturalization, though the hearing was not had until April 6th, at which time a state of war existed. *U. S. v. Meyer* (U. S.) 1918C-704. (Annotated)

ALIMONY AND SUIT MONEY.

See DIVORCE.

1. Review of decree.—Where divorce absolutely dissolves the marriage relations, and the duty of support no longer exists, there can be no review in the absence of fraud or mistake of the decree awarding or denying alimony unless warranted by statute. *Spain v. Spain* (Ia.) 1918E-1225.

2. Effect of decree of annulment on accrued rights.—In a wife's action for maintenance, wherein her husband cross-complained for annulment, the provision of the final judgment that the wife was not entitled to recover from her husband any payment of alimony or any money whatsoever for her maintenance or otherwise merely adjudicated that the wife should not recover any alimony or sum by way of permanent maintenance, a necessary result of the decree of nullity, and the provision did not preclude the wife from collecting any money due her under order pendente lite, made for temporary support, etc. *Millar v. Millar* (Cal.) 1918E-184.

AMENDMENT.

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Of pleading, see PLEADING, 16-22.

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Jurisdiction of appellate court as governed by amount in controversy, see APPEAL AND ERROR, 4-7.

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ANCILLARY ADMINISTRATION.

See EXECUTORS AND ADMINISTRATORS, 5-8, 10.

ANIMALS.

See CARRIERS OF LIVE STOCK.

ANNUITIES.

See TRUSTS AND TRUSTEES; WILLS.

1. Election to take capital sum.—Where an absolute and unqualified annuity is given by a will with instructions to invest a sum sufficient to purchase the annuity, the annuitant may elect to take the capital sum, instead of having it invested for the purpose of producing the annuity, since, if the testator deemed it necessary to protect the annuitant against improvidence, he could have done so through the instrumentality of a trust. *Matter of Cole* (N. Y.) 1918E-807.

2. Payment from income or corpus of estate.—Where a will provided an annuity to the testator's daughter, and the residuary clause is expressly made subject to the annuity, although annuities are usually payable out of income, it being a question of the intention of the testator as expressed in the will, as another clause in the will devised real estate subject to the payment of the annuity, the annuity should be charged to the principal of the estate. *Sheffield v. Cooke* (R. I.) 1918E-961.

3. Payment of taxes.—Taxes assessed against annuities, other than inheritance taxes, should be paid out of the annuities themselves. *Parkhurst v. Ginn* (Mass.) 1918E-982. (Annotated)

4. Where testator, who devised and bequeathed the bulk of his property to trustees, directing them to pay stated portions of income to various beneficiaries, and then a larger portion to a charity, declared that the gifts and annuities to individuals should first be paid before there should be any payment to the charity, such declaration does not show that the annuities are in all cases to be paid free of taxes; so taxes assessed against them should be paid out of the annuities. *Parkhurst v. Ginn* (Mass.) 1918E-982. (Annotated)

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Use of habeas corpus as appeal or writ of error, see HABEAS CORPUS, 1.

1. Right of Appeal.

1. Waiver.—That appellant accepts the money assigned to him under a judgment dissolving a corporation and distributing the funds thereof will not deprive him of his right to question the judgment so far as it dissolves the corporation or require that his appeal be dismissed. *Thwing v. McDonald* (Minn.) 1918E-420.

2. Jurisdiction and Powers of Appellate Courts.**a. In General.**

2. Quashing judgment of court of intermediate appeal.—The supreme court has constitutional authority to quash a judgment of the court of appeals where the judgment is the result of a refusal by the court of appeals to follow the last previous rulings

of the supreme court. *State v. Ellison* (Mo.) 1918C-1.

3. Final jurisdiction in criminal cases.—The constitution expressly places in the court of criminal appeals, and not in the supreme court, the final jurisdiction in all criminal cases. *Ex parte Mode* (Tex.) 1918E-845.

b. Amount in Controversy.

4. Where a judgment of the municipal court is for more than \$1,000, writ of error to the judgment of the appellate court, which reversed that of the municipal court, will not be dismissed on the ground that the judgment of the appellate court did not exceed \$1,000. *Schaefer v. Washington Safety Deposit Co.* (Ill.) 1918C-906.

5. Exclusion of costs.—Where an action is for the recovery of money only, the question whether the supreme court has jurisdiction to review the judgment at the instigation of the party ordered to pay it depends upon the amount, exclusive of costs, which the appellant is required to pay. *Shannon v. Abrams* (Kan.) 1918E-502.

6. Aggregation of several causes of action.—Under section 566 of the Civil Code where the action is for the recovery of money only, the right of appellant to have his cause reviewed by the supreme court depends on the aggregate sum of money which he is required by the judgment to pay, and is not affected by the fact that the judgment is only the total of a series of judgments on separate counts no one of which if considered independently would be for a sum large enough to confer jurisdiction for review by the supreme court. *Shannon v. Abrams* (Kan.) 1918E-502. (Annotated)

7. Where a plaintiff has acquired title to a number of outstanding claims against a defendant and his surety, and brings a single action thereon, setting up each claim in separately stated and numbered causes of action, each one of which is for a sum of money less than \$100, and where the plaintiff prevails in the action, and separate judgments are given on each count, and an aggregate judgment is awarded in his favor for a sum of money in excess of \$100, section 566 of the Civil Code gives the defendant a right of appeal to the supreme court. *Shannon v. Abrams* (Kan.) 1918E-502. (Annotated)

c. Federal Courts.

8. In an action to quiet title to a mining claim and mill site claimed under a United States patent duly recorded, where the agreed statement of facts asserted defendant's adverse possession under a certificate of tax sale, and precluded the idea of plaintiff's possession, the court's assertion that plaintiff had never taken possession was within the record, especially where the judgment for defendant did not turn upon such assertion, and a petition for a writ of error to the United States Supreme Court on the ground that the court's opinion raised a federal question would be denied. *Wren v. Dixon* (Nev.) 1918D-1064.

3. Appealable Judgments and Orders.

9. Order of intermediate court—Finality.—Where a remittitur is filed by plaintiff in a suit for personal injuries in accordance with the judgment of the court of civil appeals, such judgment may be appealed from to the supreme court by defendant by petition for writ of error; the judgment of the court of civil appeals having become final. *Wilson v. Freeman* (Tex.) 1918D-1203.

10. Order limiting examination of party.—An order practically enjoining all examination of defendant under St. 1913, § 4096, providing for the examination of adverse parties, is appealable. *Kuryer Pub. Co. v. Messmer* (Wis.) 1918C-778.

4. Parties to Appellate Proceedings.

11. Right of district attorney to appeal in divorce case.—On appeal by the district attorney in a divorce suit, the record did not show that he had been served with summons prior to the trial of the suit, or that he had appeared in the suit as required by L. O. L. § 1020, as amended in 1911 (Laws 1911, p. 126), and plaintiff moved to dismiss the appeal on the ground that the appellant had no authority to prosecute it. It is held that, in view of the fact that the district attorney had not been served as required, and that the question was not here presented, a motion to dismiss would be overruled with leave to renew it on argument of the case. *Smythe v. Smythe* (Ore.) 1918D-1094. (Annotated)

12. Death of partner.—Where, in an action against a partnership, service is made by publication and the appearance is by the partnership only, and judgment is rendered against the individuals composing the firm, and, pending the appeal, one of the parties dies, held, a failure to revive in the name of his personal representative is not fatal to the appeal, inasmuch as the trial court was without jurisdiction to render an individual judgment against the deceased. *Holmes v. Alexander* (Okla.) 1918D-1134.

5. Certification of Questions.

13. Disregarding defects.—Though a certificate from circuit court of appeals was deficient in specification and somewhat wanting in precision, the court considers it its duty to answer the questions, where the matters not specified were not in dispute and the want of precision not so fundamental as to mislead or confuse. *Boston Store v. American Graphophone Co.* (U. S.) 1918C-447.

6. Notice of Appeal.

14. Defects.—Where the notice of appeal did not name the court to which the appeal was taken, an amended undertaking describing the judgment as appealed to the supreme court may be considered as in aid of the notice, especially as it would seem that on an appeal from a judgment of the circuit court, which can be appealed only to the supreme court, the failure to name the court

is immaterial. *Smith v. Dwight* (Ore.) 1918D-563.

7. Time of Appeal.

15. A justice of the peace not having the right to grant a new trial, an appeal from a default judgment should have been perfected within the time allowed by law after the rendition of the judgment. *Welch v. Hannie* (Miss.) 1918C-325.

8. Record on Appeal.

a. In General.

16. Motion to incorporate evidence in record.—Under Gen. St. 1902, § 797, it is irregular to move to make the evidence and rulings part of the record on appeal four months before the trial court's finding was filed; such motion being proper within a week after the movant receives notice of the filing of such finding. *Plum Tree Lime Co. v. Keeler* (Conn.) 1918E-831.

17. Immaterial omission from record.—Where the decision of an appeal turns wholly on the validity of a contract set up in the answer in the action, and all the portions of the record necessary to raise and determine the question of law are before the court, the absence of minor papers in another action between the same parties from the record when the cases were tried together in the circuit court is immaterial and not ground for reversal. *Walker v. Richmond* (Ky.) 1918E-1084.

b. Transcript of Record.

18. The record on appeal must show that it contains a transcript of all that portion of the record of the trial court necessary for a consideration of the questions presented for review, and the duty of having such a transcript properly prepared and filed rests upon the appellant or plaintiff in error. *Baca v. Unknown Heirs of Jacinto Palaez* (N. M.) 1918C-612.

19. Incorporation of exhibits.—Without express statutory authority, no original paper, document, or entry in a cause can be incorporated in the transcript filed on appeal in the supreme court; but all papers, documents, and entries must be copied into the transcript, and if any such original paper, document, or entry is incorporated in the transcript, it will be disregarded. *Baca v. Unknown Heirs of Jacinto Palaez* (N. M.) 1918C-612. (Annotated)

20. The first section of rule 22 of this court contemplates the incorporation into the transcript of the record the substance of voluminous exhibits, or exhibits which are important only as to the fact of their existence or as to small portions of their subject-matter or as establishing a negative fact, either by agreement of the parties as to the statement of the contents thereof, or a statement of the contents of the same settled by the trial judge; but it makes no provision for the sending of original exhibits to this court, and their omission, or the omis-

sion of the statement mentioned, from the transcript of record. *Baca v. Unknown Heirs of Jacinto Palaez* (N. M.) 1918C-612.

21. The second section of the rule was not designed to obviate the necessity of incorporating copies of exhibits in the transcript of record, but its only purpose was to authorize the sending of original exhibits to this court whenever, in the opinion of the district judge, an inspection of the original paper would disclose some facts which could not be made to appear by a copy thereof. Where a statement of the contents of exhibits is not agreed upon, or made up as provided by the first section of the rule in question, appellant or plaintiff in error must have a copy of the exhibits, essential to a review upon appeal, inserted in the transcript, even though the district judge orders the original exhibit or exhibits transmitted to the supreme court for inspection. *Baca v. Unknown Heirs of Jacinto Palaez* (N. M.) 1918C-612.

c. Abstract of Record.

22. Requisites.—It is the duty of an appellant to furnish the supreme court with an abstract which fairly represents all portions of the record bearing upon the appeal, and not merely those portions favorable to appellant. *Martin v. Bankers Trust Co.* (Ariz.) 1918E-1240.

d. Settlement and Certification.

23. Affidavit of trial judge.—It is not proper for a trial judge, by his personal affidavit, to supplement the record of what did or did not transpire in the trial of a cause before him. *Emery v. Bennett* (Kan.) 1918D-437.

9. Bill of Exceptions.

24. The question of the sufficiency of the evidence to sustain a finding cannot be considered on appeal from a judgment, where the bill of exceptions relied on contains no specification of insufficiency of evidence, and the same is true as to an appeal from an order denying new trial, where based on a bill of exceptions. *Millar v. Millar* (Cal.) 1918E-184.

25. Where a party moved for a new trial and duly excepted to the denial thereof, but on appeal failed to include his motions or any proceedings thereon in the bill of exceptions, the court cannot consider the assignments of error, although the proceedings appeared in the printed record, since Comp. Laws 1897, § 10504, requires all motions and proceedings for the new trial to be included in the bill of exceptions. *In re Keene* (Mich.) 1918E-367.

26. No settled case or bill of exceptions is necessary to review an order disposing of a motion for a new trial made on the ground that by a clerical error of the jury the verdict returned in court was the opposite of the verdict unanimously agreed upon by them the affidavits on which such motion is made be-

ing returned. *Paul v. Pye*, (Mass.) 1918E-286.

27. Examination for incidental purpose.—Although the reasons for granting a new trial are not reviewable because not entered of record as required by Rev. St. 1909, § 2023, where they are preserved in the bill of exceptions they can be considered as throwing light upon the view the trial court took of the case. *Hays v. Hogan* (Mo.) 1918E-1127.

28. Amendment of certificate.—Where a transcript of all the evidence is sent up to the supreme court with the bill of exceptions, but is not formally made a part thereof, the court, on motion before argument, will allow an amendment of a certificate to the bill of exceptions so as to attach all the evidence. *United Brokers Co. v. Southern Pac. Co.* (Ore.) 1918D-814.

29. Excluded papers.—Where offered evidence is excluded as not proving a proper subject of counterclaim, papers whose form is immaterial, constituting part of such evidence, need not be copied into the bill of exceptions. *Neely v. Wilmore* (Ark.) 1918D-77.

10. Assignments of Error.

30. Questions not included in the statement of questions involved will not be considered by the supreme court. *McClintock, etc. Co. v. Aetna Explosive Co.* (Pa.) 1918E-1078.

31. The overruling of a challenge to a juror on the ground that his examination shows that he has an opinion as to the guilt of accused cannot be considered, where the ruling is not alleged as ground of error in the specifications of error on motion for new trial, and is not assigned in the assignments of error. *State v. Morse* (S. D.) 1918C-570.

32. On appeal to the supreme court, it is presumed that the judgment of the lower court is correct, and to overcome this presumption the error must be specified and the specification accompanied with an abstract of all that portion of the record which actuated the decision of the particular point. *Martin v. Bankers Trust Co.* (Ariz.) 1918E-1240.

33. Effect of want of proper abstract of record.—Unless an appellant presents an abstract fairly informing the court of the errors relied on, abstracting such portions as are necessary to a determination without investigating the original record, and the appellee does not supply the deficiencies, but shows the default of appellant, the assignment of errors to that extent must be disregarded. *Martin v. Bankers Trust Co.* (Ariz.) 1918E-1240.

11. Briefs of Counsel.

34. Upon appeal the statement in the briefs of the substance of the evidence bearing upon a question of fact necessary to the determination of the case "will be taken to be accurate and sufficient for a full understanding of the questions presented for decision, unless the opposite party in his brief shall deny the correctness or accuracy of the

statement, specifying with particularity the defects and inaccuracies therein, with citation of the page and paragraph of the transcript or page and question of the bill of exceptions, as the case may be, relied upon by him in support of his contentions in that regard." Supreme Court Rule 12 (94 Neb. xi). *Chicago, etc. R. Co. v. Box Butte County* (Neb.) 1918D-1037.

12. Examination of Case on Appeal.

a. What Is Brought Up by Appeal.

(1) In General.

35. Questions not raised by motion for new trial.—Trial errors not set out in the grounds of motion for new trial cannot be complained of on appeal. *Ray v. Shemwell* (Ky.) 1918C-1122.

36. Specification of grounds.—Where the notice of intention to move for new trial specifies in general terms as a ground insufficiency of the evidence to justify the findings, decision, and judgment of the court, the general specification of the insufficiency of the evidence is not sufficient to enable the court on appeal to review the question of its sufficiency. *Millar v. Millar* (Cal.) 1918E-184.

37. Where the only ground stated for motion for nonsuit is that there is no evidence justifying the court in granting the relief prayed for, or any relief whatever, the court on appeal cannot consider the evidence to review the trial court's ruling denying the motion for nonsuit, since an appellate court will not review the finding of the trial court denying such a motion upon any ground not precisely and specifically stated in it, and where no ground is sufficiently stated will not review it at all. *Millar v. Millar* (Cal.) 1918E-184.

38. Failure to produce evidence on motion for new trial.—The provision of the civil code that, in order to preserve for review a ruling excluding evidence, the evidence must be produced at the hearing of the motion for a new trial, applies as well in criminal cases, inasmuch as the criminal code makes such a ruling, if erroneous, a ground of new trial only by the adoption of the civil procedure in relation thereto. *State v. Wellman* (Kan.) 1918D-1006.

39. Matters subsequent to order appealed from.—Matters occurring after issuing of preliminary restraining order cannot be considered on appeal where no supplemental pleadings are filed. *New Method Laundry Co. v. MacCann* (Cal.) 1918C-1022.

(2) Matters Not in Record.

40. Record in another case.—In determining whether the complaint states a good cause of action upon the ground of the insurer's bad faith in refusing to settle before trial, the supreme court, on appeal, may not look into the record on the appeal in the employee's case to determine whether the employee will be able to prove a case of bad faith. *Wisconsin Zinc Co. v. Fidelity, etc. Co.* (Wis.) 1918C-399.

(3) Rulings on Evidence.

41. Absence of evidence from record.—The admission of alleged incompetent oral evidence to identify real estate defectively described in a written contract of sale cannot be reviewed, in the absence of the evidence from the record. *Mundy v. Irwin* (N. M.) 1918D-713.

b. Second Appeal.

42. Law of the case.—Decision on a former appeal is not binding, except in so far as the issues and proof are the same as upon the former appeal. *McClintock v. McClure* (Ky.) 1918E-96.

c. Examination of Questions of Fact.

(1) In General.

43. Where by a stipulation of facts it is agreed that the amount claimed was received by the defendant as interest on public funds in his hands as county treasurer, there being no statement of fact or proposition of law that the money did not belong to the plaintiff county but to the owners of the several funds, there is no such question subject to review on appeal. *Lake County v. Westerfield* (Ill.) 1918E-102.

(2) Verdict or Finding of Jury.

44. The verdict of the jury on conflicting evidence forecloses any inquiry into the credibility of the witnesses or the weight of their testimony. *Childers v. Brown* (Ore.) 1918D-170.

45. Where the evidence is so insufficient to sustain a verdict in a criminal case that it would seem to be the result of passion or prejudice, it will not be approved by a reviewing court, but in such a case the jury are the judges of the weight and credibility of the testimony, and their verdict will not be disturbed on review because the evidence is conflicting. *People v. Brady* (Ill.) 1918C-540.

46. The weight to be given to evidence submitted to a jury whose finding of fact has been approved by the trial and appellate courts cannot be inquired into in the supreme court where evidence in the record fairly supports the verdict. *Scovill Mfg. Co. v. Cassidy* (Ill.) 1918E-604.

47. On writ of error to a state court, it is not the province of the Federal Supreme Court to weigh conflicting evidence, where the record shows testimony supporting the verdict. *Great Northern R. Co. v. Donaldson* (U. S.) 1918C-581.

48. Excessiveness of damages.—Where the trial court has refused to disturb the verdict on account of the amount of damages recovered, the judgment should not be reversed, unless the amount is so excessive or so grossly inadequate as to indicate prejudice, passion, partiality, or corruption on the part of the jury. *Florence Hotel Co. v. Bumpas* (Ala.) 1918E-252.

(3) Findings of Court.

49. The trial courts findings in a suit in equity are presumptively correct, and will not be disturbed on appeal unless an obvious error has intervened in the application of the law, or serious or important mistake has been made in consideration of the evidence, especially in a case in which the testimony was taken in open court, so that the trial court had the opportunity of observing the demeanor of the witnesses, while the appellate court has before it only a condensed printed statement of the evidence. *Tobey v. Kilbourne* (U. S.) 1918C-470.

50. Findings of court of claims.—Findings of fact by the court of claims on a claim against the United States arising out of a contract for the manufacture of rapid fire guns are conclusive on the Supreme Court. *Saalfeld v. U. S.* (U. S.) 1918E-1.

(4) Direction of Verdict or Judgment on Demurrer to Evidence.

51. On appeal from a direction of the verdict, the evidence must be viewed in the light most favorable to appellants. *Neely v. Wilmore* (Ark.) 1918D-77.

52. In reviewing the evidence, on writ of error to review a judgment on defendant's demurrer to plaintiff's evidence, the court must accept as established by plaintiff whatever the jury, as reasonable men, might have concluded from the evidence. *Greenwood v. Royal Neighbors of America* (Va.) 1918D-1002.

(5) Judgment of Intermediate Appellate Court.

53. If the appellate court makes a sufficient finding of fact as to the matters in controversy, the only function of the supreme court is to determine whether the law was properly applied to the facts as found. *Schaefer v. Washington Safety Deposit Co.* (Ill.) 1918C-906.

54. Where a court of civil appeals, on appeal from judgment for plaintiff in a suit for personal injuries, held that there was no evidence to sustain the verdict, a law question is presented on error to review such judgment in the supreme court, but a holding that the evidence was insufficient to sustain the judgment does not present a question of law. *Wilson v. Freeman* (Tex.) 1918D-1203.

55. Sufficiency of finding.—A finding of the appellate court that plaintiff has not proved the defendant's liability as alleged, and has failed to prove any actionable negligence as alleged, is not a finding of fact, but the opinion of the court upon the facts. *Schaefer v. Washington Safety Deposit Co.* (Ill.) 1918C-906.

56. Conclusiveness as to amount of damages.—In an action by a county against its treasurer for interest on money in his hands as ex officio collector, the judgment of the appellate court is conclusive of the amount of damages. *Lake County v. Westerfield* (Ill.) 1918E-102.

57. On error to review the judgment of a

court of civil appeals, on appeal in an action against a railroad by its employee for personal injuries, the supreme court cannot hold the verdict not excessive, the sole cause for which the court of appeals reversed, and affirm the judgment of the trial court for the full amount, the question of excessiveness of verdict in such suit being purely a question of fact, upon which the judgment of the court of civil appeals is final. *Wilson v. Freeman* (Tex.) 1918D-1203.

d. Waiver of Error.

58. Acceptance of benefits.—An appellant who has taken the benefit of the provisions of the judgment apportioning and distributing the funds in controversy by receiving and accepting the share thereof awarded to him, is not in position to question such apportionment and distribution. *Thwing v. McDonald* (Minn.) 1918E-420.

59. When a case was reached for trial, appellant applied for a continuance. The court continued the case for trial at a place other than the county seat. It is held that the appellant, having acquiesced in the order and taken the benefit of the continuance, is estopped from now asserting that the court had no authority to make such order. *Thwing v. McDonald* (Minn.) 1918E-420.

60. Omission from brief or argument.—An exception to which no allusion is made either in the brief or the argument is deemed to be waived. *Sroka v. Halliday* (R. I.) 1918D-961.

61. As required by the provisions of rule 34 (164 N. C. 551, 81 S. E. xii), exceptions taken on the trial and not appearing in the brief must be taken as abandoned. *Campbell v. Sigmon* (N. C.) 1918C-40.

62. Objection that shipper did not give written notice of claim in the time provided, not having been urged on the argument and being only mentioned in the brief without discussion, should be considered abandoned under supreme court rule 34 (164 N. C. 551, 81 S. E. xii). *Reynolds v. Adam Express Co.* (N. C.) 1918C-1071.

63. Pleading after refusal to quash capias.—Error in refusing to quash a writ of capias ad respondendum is not subject to review on writ of error after final judgment, but must be raised by habeas corpus or mandamus before pleading. *Baxter v. Woodward* (Mich.) 1918C-946.

64. Plea of guilty.—When a defendant pleads to a criminal offense charged in an indictment—or an allegation when that is preferred upon indictment being waived—he cannot avoid the consequences of his plea and reverse the judgment entered upon it by showing that the preliminary complaint before the magistrate recited a name as that of his accuser other than that in the indictment or allegation, and also because the complaint was signed with still another name—being neither the one in the caption of the complaint nor the one used in the indictment or allegation; and especially so when no such question was raised in the

trial court. *State v. Heyer* (N. J.) 1918D-284.

13. Review of Exercise of Discretionary Power.

65. Generally, the discretion of the trial court, in ordering or refusing to order a bill of particulars is not reviewable, unless possibly in case of abuse of discretion, by Gen. Laws 1909, c. 298, §§ 16, 17, as to new trial and bills of exceptions. *State v. Davis* (R. I.) 1918C-563.

66. Though the appellate court may believe that the weight of evidence is against the verdict, the refusal of a new trial, asked on the ground of insufficient evidence, will not be disturbed, unless it appears that there was abuse of discretion in the refusal. *Armstrong v. Modern Woodmen of America* (Wash.) 1918E-263.

14. Presumptions on Appeal.

67. Sufficiency of evidence.—Where the record shows that a portion of the evidence is not included, the supreme court will presume that it is sufficient to cure defects in the evidence brought up to establish corpus delicti. *Reynolds v. State* (Ariz.) 1918D-879.

68. Facts found.—Where the jury were instructed that, if plaintiff failed to prevent squeezing in the mine in question, and negligently permitted water to accumulate therein, plaintiff was not entitled to the possession of the property sued for until the damages occasioned defendants were paid, and the jury found that plaintiff was entitled to the possession of the property, the supreme court must assume on appeal that there was a preliminary finding that plaintiff had not broken its contract by failing to prevent squeezing in the mine, etc. *Yache v. Central Coal, etc. Co.* (Ark.) 1918E-198.

69. As to finding of intermediate court.—If the appellate court makes no finding of fact, it is presumed to have found the facts the same as did the trial court. *Schaefer v. Washington Safety Deposit Co.* (Ill.) 1918C-906.

15. Reversible Error.

a. Error Must Be Material.

70. Only those errors which deprive the accused of some substantial right should be held reversible error, and a conviction should be permitted to stand, unless the error complained of has caused a substantial injury. *Thomas v. State* (Miss.) 1918E-371.

71. Where accused had a fair and impartial trial, notwithstanding he voluntarily absented himself from the courtroom during examination of two jurors, one of whom was afterwards accepted and one successfully challenged, error, if any, in proceeding with the trial is harmless, and under court rule 11 (72 South vii) cannot work reversal. *Thomas v. State* (Miss.) 1918E-371.

72. Error in permitting a party to testify what an interested witness had said was her

opinion as to the other party's right to recover does not require reversal, in view of Pub. Acts 1911, c. 32, providing that no judgment shall be reversed for error unless it materially affects the result.' *Moseley v. Goodman* (Tenn.) 1918C-931.

b. Error Must Be Prejudicial.

(1) Error in Admission of Evidence.

73. The real issue being whether plaintiff's eggs acquired their foreign and unnatural flavor before or after being put in defendant's cold storage plant, any error in admission of testimony of the president of the shipping company as to the general course of business of the company, relative to the natural quality of the eggs, as regards deterioration, when shipped, is harmless. *Perry v. Diamond Ice, etc. Co.* (Wash.) 1918C-891.

74. The issue being whether plaintiff's eggs acquired their foreign and unnatural flavor after being put in defendant's cold storage, and defendants manager having on cross-examination stated that it had never permitted fruit to be stored in any room with eggs, except when the owner expressly consented, and that this had been done on a certain occasion in the storing of the eggs of S., testimony of S. that on such occasion he had not consented to the storing of his eggs with fruit, as impeaching testimony on a collateral issue, is of too small consequence to be prejudicial. *Perry v. Diamond Ice, etc. Co.* (Wash.) 1918C-891.

75. Admission of expert testimony.—The decision of the court on the admissibility of expert testimony cannot be reversed unless clearly erroneous. *Boutlier v. Malden* (Mass.) 1918C-910.

76. Discrediting character of accused — Minimum penalty imposed.—Where accused did not take the stand himself, and the jury assessed the lightest possible penalty for murder in the first degree, though the offense could have been nothing else, the erroneous admission of evidence showing accused to have been a frequenter of low saloons and dives is harmless. *McCue v. State* (Tex.) 1918C-674.

77. Cure of error by instruction.—In an action for damages for death of plaintiff's intestate, caused by sinking of boat, hired of defendant, in which he had gone rowing, admission of evidence as to condition of other boats kept for hire by defendant is not cured by caution as to weight to be given it; the weight being for jury. *Clark v. Detroit, etc. R. Co.* (Mich.) 1918E-1068.

(2) Exclusion of Evidence.

78. In an action against a hotel keeper for disturbing and humiliating a guest, exclusion of a letter intended by the hotel keeper for the guest, but which was never received or opened by him, is harmless error. *Florence Hotel Co. v. Bumpas* (Ala.) 1918E-252.

79. In an action against a hotel company for disturbing and humiliating a guest, ex-

clusion of evidence that the manager of the hotel had had the house detective hunting for plaintiff is harmless error, where the manager stated without objection that he had made all reasonable efforts to locate plaintiff. *Florence Hotel Co. v. Bumpas* (Ala.) 1918E-252.

80. The exclusion of questions asked of a witness and to lay a foundation for direct impeachment by proof of contradictory statements made by him as a witness in the trial of another case growing out of the same accident are not prejudicial, where witness admits that, if the record on the other case is as stated to him by counsel, he will concede that he testified that way, and where a comparison of the record shows no substantial conflict. *Chambers v. Minneapolis etc. R. Co.* (N. D.) 1918C-954.

(3) Other Errors in Relation to Evidence.

81. Refusal to strike—Competency subsequently shown.—Where, in a trial to the court without a jury, the court denies a motion to strike testimony as to the receipt of money by draft in exchange for the return of a deed based on the ground that the deed and draft are the best evidence, and testimony is subsequently introduced showing that the deed was burned and never recorded, that the person who sent the draft for the drawer thereof was dead, that neither the drawer nor drawee knew where the draft was procured and that the records of the bank at which the draft was cashed were lost or destroyed, the error in refusing to strike the testimony is not prejudicial. *McKeehan v. Vollmer-Clearwater Co.* (Ida.) 1918E-1197.

82. Statement of prosecutor as to fact otherwise proved.—Where there is abundant other evidence to show that deceased had in his possession a considerable sum of money, the act of the prosecutor in stating to the jury that memoranda found with the body of deceased showed that he was hard-working and had money in his possession is harmless. *McCue v. State* (Tex.) 1918C-674.

(4) Error in Instructions.

83. Error in instructions on the measure of damages are harmless, where plaintiff, who was shot while hunting, recovered no damages. *Gibson v. Payne* (Ore.) 1918C-383.

84. Error in failing to state the plaintiff's theory of her case as clearly as possible is not ground for reversal, if it does not affect the result of the trial, in view of Pub. Acts 1911, c. 32. *Moseley v. Goodman* (Tenn.) 1918C-931.

(5) Error in Submitting Question to Jury.

85. Submitting question of law.—The giving of an instruction which left to the jury the construction of a contract which, as matter of law, should have been construed contrary to plaintiff's contention, being error favorable to plaintiff, is not error of which

he could complain. *Creditors Nat. Clearing House v. Bannwart* (Mass.) 1918C-130.

86. Where the court should have instructed that plaintiff insured was the owner of property burned, defendant insurance company cannot complain because the question was left to the jury. *Waller v. New York Ins. Co.* (Ore.) 1918C-139.

87. Submitting question not in issue.—Although defendant insurance company's allegations regarding plaintiff's misrepresentations are insufficient, yet instructing that such defense may be waived, constitutes reversible error where waiver is not an issue. *Waller v. New York Ins. Co.* (Ore.) 1918A-139.

88. Submission of issue not controverted.—In an action against a railroad, under the federal employers' act, for death of its fireman when his train was derailed, where the pleadings admit and the proof shows that defendant was engaged in interstate commerce, and that the train was at the time making an interstate trip, the submission to the jury of the question whether defendant was engaged in interstate commerce at the time of the accident is harmless error. *Davis v. Cincinnati, etc. R. Co.* (Ky.) 1918E-414.

c. Errors Not Available.

(1) Questions Not Raised Below.

89. Objections to evidence not brought to the attention of the trial court or based upon exceptions cannot be considered. *Baxter v. Woodward* (Mich.) 1918C-946.

90. Where a party defendant in a mortgage foreclosure suit did not claim costs below, the trial court's failure to allow costs to him will not be reviewed. *Simmons v. Northern Pac. R. Co.* (Wash.) 1918C-1184.

91. A question not presented and argued in the court below will be held to have been waived and abandoned, and will not be considered in an appellate tribunal. *State v. Heyer* (N. J.) 1918D-284.

92. Exceptions to findings of fact are immaterial where a new trial is necessary because of error in excluding evidence. *Davis v. Dunn* (Wt.) 1918D-994.

93. Where a Minnesota statute giving attorneys a lien on the cause of action of their clients was held applicable to an action in the courts of that state, based on the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65, and Act April 5, 1910, c. 143, 36 Stat. 291, 8 Fed. St. Ann. [2d ed.] 1208), and that the pleadings showed that the action was one for injuries received in interstate commerce, and the question of the applicability of the statute was discussed in the state court, a writ of error to review the judgment on the ground that the statute as construed was repugnant to the Constitution and laws of the United States cannot be dismissed on the theory that the question had not been raised below. *Dickinson v. Stiles* (U. S.) 1918E-501.

(2) Sufficiency of Objection or Exception.

94. Duty to make specific objection.—The

duty of an attorney as an officer of the court is to assist the court in arriving at a just and lawful conclusion and judgment in every cause; and when he has a proper objection to the pleadings or proceedings, he should point out clearly and specifically the grounds for his objection; and when he fails to make it with such clearness and precision that the court can understand it, he will ordinarily be held to have waived his objection. *Following Riverside v. Bailey*, 82 Kan. 429, 431, 108 Pac. 796. *Emery v. Bennett* (Kan.) 1918D-437.

95. Objections to pleading.—Objections made at the trial to the sufficiency of a pleading must definitely point out the alleged errors, and, when that is not done, the pleading will be liberally construed in order to uphold the judgment. *Cleveland v. Bateman* (N. M.) 1918E-1011.

96. Where a plea is bad and was properly so held, it is unimportant that the objection was raised below by motion to strike and not by demurrer. *Cain v. Osler* (Ia.) 1918C-1126.

97. Objection to evidence.—Objection that no foundation was laid for impeachment testimony cannot be considered on appeal, where the only trial objection to such testimony was that the evidence was immaterial. *Baxter v. Woodward* (Mich.) 1918C-946.

98. Exceptions to instructions.—Instructions given by the court and not excepted to by the defendant at the trial or before the trial court, will not be reviewed on appeal, unless fundamental error is apparent. *Poling v. State* (Okla.) 1918E-663.

(3) Errors Favorable to Appellant.

99. As the state cannot appeal in criminal cases, the only matter which the court of criminal appeals can review is whether error was committed against accused; and, if so, was the error prejudicial. *McCue v. State* (Tex.) 1918C-674.

100. In a trial for obtaining money and property by means of the confidence game, defendants may not object to rulings on the admission and rejection of evidence more favorable to them than the law required. *People v. Brady* (Ill.) 1918C-540.

101. Where defendant was found guilty on several counts, and the prosecutor entered a nolle pros. as to some of the counts, defendant was not injured. *People v. Brown* (Ill.) 1918D-772.

(4) Wrong Reason for Correct Decision.

102. It is not reversible error for a judge to base his correct judgment on the wrong case previously decided, the question being whether the conclusion is right, and not whether the trial judge assigned the right reason for it. *Berry v. Marion County Lumber Co.* (S. C.) 1918E-877.

103. Where proper findings of fact based upon the evidence have been made, it is not ordinarily important what course of judicial reasoning is announced by the trial court in arriving at its decision when the decision it-

self is correct. *Saylor v. Crooker* (Kan.) 1918D-473.

16. Decision or judgment of Appellate Court.

104. Reversal without remand.—Where plaintiff could not, under any theory under the evidence, recover, a judgment for plaintiff will be reversed without remand. *Connecticut Fire Ins. Co. v. W. H. Rogers Lumber Co.* (Va.) 1918E-1045.

105. Remand for further hearing.—Where in a suit to set aside an award of arbitrators determining the compensation to which a railroad which built a bridge was entitled for its use by another road under a common user clause of the city ordinance authorizing the building, it is extremely difficult in the condition of the record to appraise fairly the value of the realty covered by the abutments and approaches to the bridge, the cause should be remanded to the trial court for a hearing on the subject, both parties to be privileged to introduce further testimony. *Oregon-Washington R. etc. Co. v. Spokane, etc. R. Co.* (Ore.) 1918C-991.

106. Modification.—Where a husband contracts to pay a broker a commission for an exchange of property, a judgment, broad enough to be considered as a personal judgment against the wife individually, while erroneous does not necessitate a reversal of the judgment, but it will be so modified as to run against the husband and the community. *Godefroy v. Hupp* (Wash.) 1918E-494.

107. Granting new trial.—Under Code Civ. Proc. § 1346, providing that an appeal may be taken to the appellate division on questions of law or on the facts or on both from a judgment on a verdict, or on trial by the referee or court without a jury, on appeal to the court of appeals from a judgment of the appellate division reversing a judgment for plaintiff entered upon a verdict and dismissing the complaint, where it appears that the appellate division has reviewed the facts and is not satisfied therewith, the court of appeals, reversing, should grant new trial. *Meisle v. New York Cent. etc. R. Co.* (N. Y.) 1918E-1081.

108. Objection to form of decree after decision on appeal.—No objection to the form of the decree in a suit to foreclose a vendor's lien, based upon the recital therein that plaintiff "do have and recover" a certain sum of money, can be raised in the proceedings had after such decree was affirmed on appeal, where this objection was not taken on the appeal. *Pease v. Rathbun-Jones Engineering Co.* (U. S.) 1918C-1147.

109. Instructions on second trial where new issue raised.—Where a new issue, raised by the amended pleadings, was the only issue on second trial upon which to instruct the jury, the instructions should have been confined to such issue, as though no former appeal had been taken and without regard to the opinion upon such appeal. *McClintock v. McClure* (Ky.) 1918E-96.

110. Decision of intermediate court of appeal.—An appellate court may reverse a judgment for error of law or error of fact. If for

error of law, which may be corrected on another trial, the cause must be remanded; but if for error of fact, where no material evidence has been wrongfully excluded, the judgment of the appellate court may be final, but the other facts on which the judgment rests must be found and recited in the judgment. *Schaefer v. Washington Safety Deposit Co.* (Ill.) 1918C-906.

17. Supersedeas and Bond.

a. In General.

111. Deposit in lieu of bond.—No order of court is required to allow the making of a deposit in lieu of an appeal bond, as authorized by Gen. St. 1913, § 8002. *Thwing v. McDonald* (Minn.) 1918E-420.

112. The deposit, made in lieu of an appeal bond, pursuant to Gen. St. 1913, § 8002, being conditioned only for payment of the costs of appeal, does not stay proceedings on the judgment. *Thwing v. McDonald* (Minn.) 1918E-420.

113. Necessity for undertaking by state in divorce case.—It is not ground for the dismissal of an appeal by the district attorney in a suit for divorce that he filed no undertaking; L. O. L. § 578, expressly excusing the state from filing an undertaking. *Smythe v. Smythe* (Ore.) 1918D-1094.

b. Amendment of Bond.

114. An amended undertaking on appeal given in response to a motion to dismiss, questioning the sufficiency of the undertaking, should be filed upon leave obtained from the supreme court, and as an independent pleading in the proceeding. *Smith v. Dwight* (Ore.) 1918D-563.

c. Summary Judgment against Sureties.

115. A federal court of equity is not without jurisdiction on the ground of the existence of an adequate remedy at law to render a summary judgment, conformably to the local law, against sureties on an appeal bond, where the decree appealed from has been affirmed. *Pease v. Rathbun-Jones Engineering Co.* (U. S.) 1918C-1147.

(Annotated)
116. The constitutional right of trial by jury presents no obstacle to the rendition by a federal district court, conformably to the local law, of a summary judgment against the sureties on an appeal bond upon the affirmation of the decree appealed from, since a person, by becoming a surety, submits himself to be governed by the fixed rules which regulate the practice of the court. *Pease v. Rathbun-Jones Engineering Co.* (U. S.) 1918C-1147.

(Annotated)
117. In an action against a railroad company and others, where the road's appeal, as stated by the notice thereof, is "from a judgment in favor of the plaintiff," and its supersedeas bond recites that the road desired to appeal from the judgment and the whole and every part thereof, the remittitur on affirmation, directing judgment on the supersedeas

bond in favor of the plaintiff against the road and the sureties on the supersedeas bond for a money judgment recovered against other defendants, judgment in the trial court having gone against the railroad only to the extent of barring any interest in certain property, except a right of way, and for costs, is proper, and not open to modification. *Simmons v. Northern Pac. R. Co.* (Wash.) 1918C-1184. (Annotated)

118. A decree entered pursuant to the mandate of a federal circuit court of appeals in an action to foreclose a vendor's lien is not void in so far as it orders a deficiency execution to issue against the defendant and the sureties on his appeal bond, where the original decree, which the circuit court of appeals affirmed, adjudged that plaintiff "do have and recover" a certain sum of money, established a lien on certain property, and ordered the sale thereof to satisfy the judgment if not paid in a specified time, and the mandate from the appellate court commanded that "such execution and further proceedings be had in said cause as, according to right and justice and the laws of the United States, ought to be had." *Pease v. Rathbun-Jones Engineering Co.* (U. S.) 1918C-1147.

119. Waiving notice.—The jurisdiction or power of a federal district court to render summary judgment against the sureties on an appeal bond upon an affirmance of the decree appealed from, and without notice to the sureties, may not be questioned after the parties have, by motions subsequently filed, invoked a decision of the court upon the question of the sureties' liability on the evidence presented by them, no relevant fact being in dispute. *Pease v. Rathbun-Jones Engineering Co.* (U. S.) 1918C-1147.

(Annotated)

120. Effect of payment to preclude review.—The payment by a surety on the appeal bond of a dissolved corporation, "as trustee for himself and the other stockholders," of the deficiency execution issued on the bond upon the affirmance of the decree appealed from relieves an appellate court from the necessity of determining whether the trial court erred in entering judgment against the sureties for the deficiency instead of judgment merely for the costs and any damages to the plaintiff resulting from the delay incident to the unsuccessful appeal. *Pease v. Rathbun-Jones Engineering Co.* (U. S.) 1918C-1147.

18. Costs.

121. Fees for serving papers.—Sheriff's fees for serving notice of appeal, as well as the record and briefs, on defendants, who were not adverse parties, cannot be allowed as part of appellant's costs and disbursements. *Thwing v. McDonald* (Minn.) 1918E-420.

122. Where notice of appeal is served on the attorney for a party, appellant is not entitled to costs for service of notice on the parties; such service being unnecessary. *Thwing v. McDonald* (Minn.) 1918E-420.

123. Expenses for the serving of notice of
Ann. Cas. Dig. 1918C-E.—3.

an appeal by a private party cannot be allowed appellant as costs. *Thwing v. McDonald* (Minn.) 1918E-420.

124. Cost of papers not used in appeal.—Costs cannot be allowed appellant for certified copies of the records, where it did not appear that they were for use in the appellate court. *Thwing v. McDonald* (Minn.) 1918E-420.

19. Rehearing.

125. To suggest or set up a federal question for the first time in a petition for rehearing in the highest court of the state is not in time. *Wren v. Dixon* (Nev.) 1918D-1064.

126. Where at the original hearing on appeal a decree setting aside an award by arbitrators was affirmed and compensation for the use of a railroad bridge by another railroad was determined by the court, which compensation included a requirement that the using railroad should pay a specified percent of the interest charged on the cost of the bridge, on which question there was no argument in the court below or on the original hearing, the original opinion will be withdrawn as to that provision and the cause remanded to the lower court for a hearing thereon. *Oregon-Washington R. etc. Co. v. Spokane, etc. R. Co.* (Ore.) 1918C-991.

APPEARANCE.

1. By partner.—Under Rem. & Bal. Code, § 241, declaring every appearance general unless defendant states it to be special, the answer stating "come now defendants R. and C. as a member of the firm of D. & Co., and not otherwise," is, notwithstanding prior successful special appearance by C., to quash service against him, a general appearance, bringing him into court not only as a partner but an individual, individual liability being the essence of partnership obligations. *National Union F. Ins. Co. v. Dickinson* (Wash.) 1918C-1042.

APPLIANCES.

Master's duty as to, see MASTER AND SERV-
ANT, 4, 5.

ARBITRATION AND AWARD.

1. Agreement to Arbitrate, 34.

2. Award:

- a. Setting Aside or Impeachment, 34.
- b. Effect of Award, 34.
- c. Enforcement, 34.

Award by arbitrators pending execution of contract as modification of contract, see CONTRACTS, 27.

Construction of provision in charter party for settlement of all disputes by arbitration, see SHIPS AND SHIPPING, 1, 2, 4.

Enforceability of foreign contract to arbitrate, see CONFLICT OF LAWS, 1.

1. Agreement to Arbitrate.

1. Where a lease granted the lessee the privilege or option to purchase the property after ten years at a value to be determined by "appraisal," and provided that the decision of any two of the three appraisers should be binding on the parties, the arrangement to have the value of the lots fixed by appraisers was not an agreement to submit to arbitration, revocable by the lessee, but an irrevocable agreement made before controversy, to leave the incidental matter of price to appraisers or referees, and sublessees having refused to abide by the decision of two appraisers, after exercising their option to purchase, could be compelled to perform by bill for specific performance. *Martin v. Vansant* (Wash.) 1918D-1147.

(Annotated)

2. Revocation.—At common law, the power of arbitrators to make a binding award is subject to revocation at any time before an award is made, unless the submission is governed by statute or made a rule of court, the remedy of the aggrieved party in case of revocation being an action in damages for breach of the agreement to arbitrate. *Martin v. Vansant* (Wash.) 1918D-1147.

(Annotated)

2. Award.

a. Setting Aside or Impeachment.

3. The rule that a judgment of the chancellor cannot be substituted for that of arbitrators does not prevent courts of equity from setting aside awards of arbitrators for fraud or mistake. *Oregon-Washington R. etc. Co. v. Spokane* (Ore.) 1918C-991.

4. An award of arbitrators may be impeached for their mistake in setting down their conclusion, although the mistake appears dehors the award only. *Black v. Woodruff* (Ala.) 1918C-969.

(Annotated)

5. While an award of arbitration entered in a pending suit is not open to collateral attack, its correctness may be attacked in a proceeding for its specific enforcement, although the defense is not brought forward by a cross bill. *Black v. Woodruff* (Ala.) 1918C-969.

(Annotated)

6. Estoppel.—A party to an award of arbitrators is under no obligation to be present when the award is made, and failure to be present does not estop him from attacking the correctness thereof. *Black v. Woodruff* (Ala.) 1918C-969.

(Annotated)

7. Evidence.—In a suit to set aside an award of arbitrators on the ground of mistake, affidavits showing facts subsequent to the award have no bearing on the question of whether it should be set aside, but may be considered by the court at the hearing after the award has been vacated. *Oregon-Washington R. etc. Co. v. Spokane, etc. R. Co.* (Ore.) 1918C-991.

8. In a suit to set aside an award by arbitrators on the ground that because of mis-

take the award did not represent the judgment of the arbitrators, the evidence taken before the arbitrators is competent and material. *Oregon-Washington R. etc. Co. v. Spokane, etc. R. Co.* (Ore.) 1918C-991.

9. In a suit to set aside an award of the railroad commission sitting as arbitrators to determine the compensation of a railroad which built a bridge for its use by another road, the evidence is held to sustain finding that the award so entirely disregarded, mistook, and misapplied the evidence introduced at the hearing before the commissioners as to deprive plaintiff road of its rights in the bridge, and of its rights in the ordinance of a city authorizing its building and containing a common user clause and in the resolution and order of the secretary of war authorizing the bridge. *Oregon-Washington R. etc. Co. v. Spokane, etc. R. Co.* (Ore.) 1918C-991.

(Annotated)

10. Matters to be determined.—In suit to set aside an award of the railroad commission sitting as arbitrators to determine the compensation to which a railroad which built a bridge was entitled for its use by another road, where the answer of such other road asked general equitable relief, the court, having set aside the award as inadequate, should proceed to determine the reasonable compensation to be awarded. *Oregon-Washington R. etc. Co. v. Spokane, etc. R. Co.* (Ore.) 1918C-991.

11. Decree.—Where the parties to a suit to set aside an award of arbitrators agreed before the arbitrators on stipulations modifying the common-law rules of liability in the matter which the arbitration concerned, such stipulations, incorporated in the award, should be made part of the decree setting it aside and correcting its errors. *Oregon-Washington R. etc. Co. v. Spokane, etc. R. Co.* (Ore.) 1918C-991.

12. Resubmission.—In suit to set aside an award of arbitrators, in the absence of agreement by the parties, the court is not authorized to resubmit a question to the board of arbitrators. *Oregon-Washington R. etc. Co. v. Spokane, etc. R. Co.* (Ore.) 1918C-991.

b. Effect of Award.

13. Modification.—Where arbitrators have returned an award in a pending suit, they are powerless subsequently to modify it, since their authority ceases upon the return of the award to the court. *Black v. Woodruff* (Ala.) 1918C-969.

c. Enforcement.

14. Absence of order authorizing award.—An award by arbitrators made in a suit to rescind a land contract may be enforced by specific performance, although the award could not be entered as a decree because of failure to have a preliminary order of the court authorizing it. *Black v. Woodruff* (Ala.) 1918C-969.

15. Effect of mistake.—In a suit to rescind a land contract, the parties agreed to

submit the amount of reimbursement to arbitration. The arbitrators returned an award in two separate papers, one of which determined that defendant pay to plaintiff a certain sum, with half of the costs of the arbitration and certain witness fees. The other determined that plaintiff pay to defendant a certain smaller sum for rent and half of the costs of arbitration and for witness fees. The two sums were then added, and the amount which plaintiff had to pay was subtracted therefrom, and the result filed as the award. Defendant claimed that the sums of the two parts of the award should have been subtracted, making him liable for that difference only. It is held that it was error to enforce specifically the award as made; it not expressing the actual decision of the arbitrators. *Black v. Woodruff* (Ala.) 1918E-969. (Annotated)

ARCHITECTS.

Necessity for architect's certificate under building contract, see **CONTRACTS**, 31, 32

ARGUMENT AND CONDUCT OF COUNSEL.

See **ATTORNEYS**.

1. Right to open and close.—Under Code 1906, § 2864, providing that, on trial of an issue on an avowry, the burden of proof shall be on the avowant, the landlord, and he shall have the right to open and conclude the argument, when an issue has been tendered on the avowry, denying the allegations of the avowry, the burden is on the landlord, or avowant, and if the relation of landlord and tenant, the amount of the contract, or the amount of supplies furnished, is denied, the landlord must assume the burden and prove his contention, but if the relation be admitted, and the amount of the rent contract for supplies furnished is not denied, no issue is made on the avowry, and, if plaintiff undertakes to confess and avoid by an affirmative plea setting up new matter, and issue is tendered on the plea, the burden shifts, plaintiff assuming it, and having the right to open and conclude the evidence and argument. *McNeer v. Norfleet* (Miss.) 1918E-436.

2. Reference to race of accused.—On the trial of a negro charged with the murder of a white man, before a jury of white men, the county attorney in his opening argument referred to the defendant as "this black murderer." On objection being made, the court admonished counsel to be temperate in his remarks. The county attorney in his closing argument referred to the defendant as "this coal-black murderer." Again, objection being made, the court peremptorily overruled the same. The language objected to, held to be grossly improper, and prejudicial to the defendant; and the refusal of the court to interfere and to properly instruct the jury to disregard the same prejudicial error. *Morehead v. State* (Okla.) 1918C-416.

3. Reference to financial condition of plaintiff.—In an action for slander, where the misconduct of plaintiff's counsel in arguing to the jury the financial condition of plaintiff is partially responsible for the excessive verdict, it is prejudicial error, although the discussion was started by defendant's counsel in his address to the jury, and the misconduct of counsel is ordinarily a matter for the discretion of the trial court. *Cain v. Osler* (Ia.) 1918C-1126.

4. Challenging opponent to waive rights.—On the trial of a will contest it is improper and prejudicial for the contestant's attorney repeatedly to challenge the attorney for the proponents to waive the statutory prohibition against evidence of interested witnesses as to personal transactions with the decedent, and to state that proponents would take advantage of every possible technicality, and that one of the proponents married a domestic in the testator's family for the purpose of making her an incompetent witness. In *re Connor's Will* (Ia.) 1918C-378. (Annotated)

ARMY AND NAVY.

1. Validity of conscription act.—Selective Draft Act of May 18, 1917, c. 15, 40 Stat. 76 (Fed. St. Ann. Pamph. Supp. No. 11, p. 85), is valid, in so far as it authorizes the President to make rules and regulations for its enforcement having the effect of law, and is not open to attack as a delegation of legislative authority. *Franke v. Murray* (U. S.) 1918D-98. (Annotated)

2. Persons subject to military law.—Repeals by implication are never favored, and only when the two acts are totally inconsistent will the older be held repealed by the later. Therefore Articles of War, art. 2 (Fed. St. Ann. Pamph. Supp. No. 8, p. 287), defining persons subject to military law, is not repealed by section 6 of the selective draft act, declaring that a violation of any of the provisions of the act shall be a misdemeanor. *Franke v. Murray* (U. S.) 1918D-98.

3. The provision of Selective Draft Act, § 6, that it shall be a misdemeanor to violate any of the provisions of the act or regulations made thereunder, does not preclude punishment under military law by one subject thereto, because he was duly certified into the service; the section itself expressly excepting those subject to military law. *Franke v. Murray* (U. S.) 1918D-98.

4. Articles of War, art. 109 (Fed. St. Ann. Pamph. Supp. No. 8, p. 305), requiring every soldier at the time of his enlistment to take an oath of allegiance, applies only to voluntary enlistment, and one certified into military service under the selective draft act cannot escape liability to military law because he had not taken the required oath. *Franke v. Murray* (U. S.) 1918D-98. (Annotated)

5. Review of draft board.—While, under the selective draft act, questions of exemption on account of membership in a religious sect opposed to war are for determination

of the local and district boards, and their finding cannot be reviewed by the courts, unless they were without jurisdiction or denied a fair hearing, registrants are not deprived of due process of law. *Franke v. Murray* (U. S.) 1918D-98. (Annotated)

6. The determination by local and district boards provided for by the selective draft act of questions of exemption is conclusive, and cannot be reviewed by the courts, unless the boards were without jurisdiction, or a fair hearing was denied. *Franke v. Murray* (U. S.) 1918D-98. (Annotated)

7. **Desertion.**—Selective Draft Act, § 2, provides that all persons drafted into the service of the United States shall, from the date of the draft or acceptance, be subject to the laws and regulations governing the regular army. Articles of War (Rev. St. § 1342, as amended by Act Aug. 29, 1916, c. 418, § 3), art. 2, 39 Stat. 651 (Fed. St. Ann. Pamph. Supp. No. 8, p. 287), declares that all officers and soldiers belonging to the regular army, all volunteers, from the date of their muster or acceptance, and all other persons lawfully called, drafted, or ordered into or to duty or for training in the service, from the dates they are required by the terms of the called draft or order, are persons subject to military law. It is held that one certified into military service under the draft act is from the date of the draft subject to military law, and to punishment as a deserter on account of his refusal to obey the summons. *Franke v. Murray* (U. S.) 1918D-98.

8. **Receiving property of soldier.**—Under the act (Army Act 1881, § 156, subsec. 1) penalizing any person who "buys, exchanges, takes in pawn, detains or receives" from a soldier any government stores the detention contemplated is from the government and not from the soldier. *Pullen v. Carlton* (Eng.) 1918D-1201. (Annotated)

9. Demand and refusal are not necessary to fix the liability under the statute for detaining property. *Pullen v. Carlton* (Eng.) 1918D-1201. (Annotated)

ASSAULT.

Liability of railroad for assault on passenger, see **CARRIERS OF PASSENGERS**, 10.

Necessity of finding degree of crime in prosecution for assault with intent to kill, see **VERDICT**, 6, 7.

1. **Assault with intent to kill—Indictment.**—An information, which alleges that accused did commit the crime of assault with intent to kill a person named, by then and there wilfully and feloniously shooting at the person named with a loaded pistol with intent to kill him, states the offense denounced by Pen. Code, § 285, punishing assaults with intent to kill. *State v. Morse* (S. D.) 1918C-570.

2. **Issue of self-defense.**—Where, on a trial for assault with intent to kill by shooting, accused admitted that, in pointing the revolver at prosecutor, he intended to "bluff"

him into talking sensibly, and claimed that it was the pressure of the hand of prosecutor on accused's hand in which the revolver was held that caused its discharge, and there was evidence that prosecutor had a few minutes previously called accused a vile name, that the parties had separated, and accused was searching for prosecutor at the time of the shooting, the issue of self-defense is not raised so as to require an instruction thereon. *State v. Morse* (S. D.) 1918C-570.

ASSESSMENTS.

See **BENEFICIAL ASSOCIATIONS**, 4-11.

For public improvements, see **TAXATION**, 49
Of tax, see **TAXATION**, 5-20.

ASSESSOR.

Nature of duties, see **TAXATION**, 5.

ASSETS.

Of decedent's estate, see **EXECUTORS AND ADMINISTRATORS**, 12.

ASSIGNMENTS.

1. What May Be Assigned, 36.

2. What Constitutes Assignment, 37.

3. Construction and Effect of Assignment, 37.

See **ASSIGNMENTS FOR BENEFIT OF CREDITORS**.
Of accounts to mortgagee as collateral security, see **CHATTEL MORTGAGES**, 7, 8.

Of corporate stock as security, see **PLEDGE**, 3.
Of lease, see **LANDLORD AND TENANT**, 11, 16, 17.

Of note secured by deed of trust, see **MORTGAGES**, 8, 9.

Of unlocated certificate of public lands, see **PUBLIC LANDS**, 8.

Giving bill of sale as security as assignment within condition of fire insurance policy, see **FIRE INSURANCE**, 9.

Priority between lien claimant and assignee of fund due contractor, see **MECHANICS' LIENS**, 14, 15.

Validity of assignment of corporate stock as collateral security as against trustee in bankruptcy, see **BANKRUPTCY**, 2.

1. What May Be Assigned.

1. **Prohibiting assignment to nonresident for collection.**—Sess. Laws 1910, § 2, c. 14, p. 19 (section 2912, Rev. Laws 1910), inhibiting any assignment of a claim or debt for the purpose of attachment, garnishment, or other mesne process, outside of this state, when the creditor, the debtor (being a citizen of this state), and the person or corporation owing the money intended to be reached by such process are all within the jurisdiction of this state, is within the police power of the state

and is constitutional and valid to the extent of such inhibition.

(a) As to whether the further provision in said section that, in such situation of all such parties, any assignment of a claim or debt "which is thereafter attempted to be collected out of the wages or personal earnings of the debtor, in courts outside of the state of Oklahoma," is prohibited, is constitutional and valid, is not determined; but its constitutionality is doubted. *St. Louis, etc. R. Co. v. Crews* (Okla.) 1918C-823.

2. Assignment of statutory liability of corporate officer.—Claims against corporate officers arising from the incurring of debts by the corporation while less than half its capital stock was subscribed with their knowledge, under the liability therefor imposed by *St. 1913, § 1774n*, are assignable, since such section imposes a contractual relation on the officers and not a penalty in its strict sense. *Weston v. Dahl* (Wis.) 1918C-922.

Progress payment.—An assignment of a progress payment for work done under a contract for a public improvement is valid—the municipality not objecting—as against any rights of a subcontractor who thereafter served notice on the municipality to withhold payment, as permitted by *Cal. Code, Civ. Proc. § 1184*, although such assignment did not receive the consent of the board of public works, and the contract expressly provides that without such consent the contractor shall not "either legally or equitably assign any of the moneys payable under the contract or his claim thereto." *Portuguese-American Bank of San Francisco v. Welles* (U. S.) 1918D-643. (Annotated)

2. What Constitutes Assignment.

4. A written order by a contractor to a county to pay a bank money due on a monthly estimate of work done and "all retained percentage" was an "equitable assignment" of the designated money. *Wasco County v. New England Equitable Ins. Co.* (Ore.) 1918E-656.

5. Building contracts.—Where a city, which has contracted for paving work, retains, under the contract, from an amount paid the contractor, a fund to satisfy the claim of a subcontractor, which is one of the items or payments shown on the voucher and warrant check by which final settlement with and payment to the contractor are made, and the indorsement of the warrant check by the contractor is declared to constitute "a release for the items and amounts stated in the body of the warrant," the effect of the indorsement of the warrant is that of an equitable assignment to the subcontractor of the fund retained, and the assignees for the benefit of the creditors of the contractor cannot claim the fund against the subcontractor in the absence of evidence that the claim has been fully discharged. *Kellas v. Slack, etc. Co.* (Md.) 1918D-640. (Annotated)

6. The provision, in a city's contract for paving work, that the city may retain from payments due the contractor sufficient to satisfy claims filed for labor and material for

the work, does not give a subcontractor a lien on the money retained by the city, and does not operate as an equitable assignment of the fund. *Kellas v. Slack, etc. Co.* (Md.) 1918D-640. (Annotated)

7. Where a bank pays and takes assignments of labor and material claims, as the materialman or laborer's claim against the contractor's bond is ancillary to and dependent upon his right against the contractor, an assignment of the right against the contractor operates as an equitable assignment of the right against the bond. *Northwestern Nat. Bank v. Guardian Casualty, etc. Co.* (Wash.) 1918D-644. (Annotated)

3. Construction and effect of Assignment.

8. Validity against garnishing creditor.—Where a defendant corporation assigned to a bank the proceeds of a contract due and to become due for furnishing materials and labor to a building contractor, such assignment is valid as against a garnishment of the funds in the hands of the building contractor. *Hall v. Kansas City Terra Cotta Co.* (Kan.) 1918D-605. (Annotated)

9. Such an assignment is not a chattel mortgage requiring registration to be valid against the claim of another creditor proceeding by writ of garnishment. *Hall v. Kansas City Terra Cotta Co.* (Kan.) 1918D-605. (Annotated)

10. Priority of assignee.—Assignment to a bank of all moneys to become due to contractors as security for notes taken and filed with the city comptroller prior to any notice that labor and material claims have not been or will not be paid, the contract containing no provision for an absolute reserve for labor and material claims, but only permitting the city to withhold payment until satisfied that all such claims have been paid, and nothing having been held up by the city at the time the assignments were made, must be treated as a valid appropriation to the bank's notes of the fund afterward paid into court by the city, superior to any right of laborers or materialmen, and hence superior to any right of subrogation in the surety, as the bank has a superior equity. *Northwestern Nat. Bank v. Guardian Casualty, etc. Co.* (Wash.) 1918D-644. (Annotated)

11. Assignments of labor and material claims are not, because of the agreement between the contractor and bank to advance money for this purpose, extinguished, so far as the bond is concerned, upon their payment by the bank, but the bank had the same right to purchase and take assignment of the claim "as anyone else. *Northwestern Nat. Bank v. Guardian Casualty, etc. Co.* (Wash.) 1918D-644. (Annotated)

12. Where a bank pays and takes assignments of the claims for labor and material under an agreement with the contractor, the surety cannot claim that because it was not surety for claims for money advanced by the bank to the contractor, but only for labor and material claims, as between the bank and the surety, a fund paid into court by the

city should be first applied, to the assigned claims and not the contractor's prior claim. *Northwestern Nat. Bank v. Guardian Casualty, etc. Co.* (Wash.) 1918D-644.

(Annotated)

13. The claims of two subcontractors and their bookkeeper, not being lienable claims, are not assertable against either the fund paid into court by the city or against the contractor's bond to the exclusion of the surety's right of subrogation, and the assignment of their claims carry no rights except rights of action against the contractors personally. *Northwestern Nat. Bank v. Guardian Casualty, etc. Co.* (Wash.) 1918D-644.

(Annotated)

14. Money due on a contract, but retained by a county until completion and acceptance of work, was by written order assigned by the contractor to a bank in consideration of money loaned the contractor and used by him to pay for labor and material which he was bound by his contract to pay for. The contractor's bond, as required by law, obliged the surety to pay for labor and material and also to complete the work. The contract provided, as required by Laws 1913, p. 251, for retention of the money assigned until completion and acceptance of the work. It is held, that on the contractor's default, until claims for labor and material were paid, the county's right to the fund assigned was superior to that of the assignee bank, and that when the contractor's surety paid for labor and material as required, it was entitled to be subrogated, as against the bank, to the rights of the county as of the date of its contract, and hence the surety's right to the fund was superior to the assignment to the bank, which was bound to know, when it voluntarily loaned its money, of the surety's equity in the funds reserved. *Wasco County v. New England Equitable Ins. Co.* (Ore.) 1918E-656.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See ASSIGNMENTS; BANKRUPTCY.

1. Rights of assignee.—Assignees for the benefit of the creditors of a contractor with a city for paving work are not bona fide purchasers for value, but stand in the place of the assignor, and take the property subject to all equities against it. *Kellas v. Slack, etc. Co.* (Md.) 1918D-640.

ASSIGNMENTS OF ERROR.

See APPEAL AND ERROR, 30-33.

ASSOCIATIONS.

See BENEFICIAL ASSOCIATIONS; BUILDING AND LOAN ASSOCIATIONS; CORPORATIONS.

ASSUMPSIT.

Implied contract to pay broker's commission, see BROKERS, 4, 5.

Waiver of tort and suit in assumpsit, see TORTS, 2.

1. Foundation of action.—The action for money had and received was invented to secure relief from restrictions of the common-law forms of procedure which afforded no remedy in too many cases of merit. The action is a modified form of the action of assumpsit. It is founded on the principle that no one ought to unjustly enrich himself at the expense of another, and the gist of the action is that the defendant has received money which in equity and good conscience should have been paid to the plaintiff, and under such circumstances that he ought, by the ties of natural justice, to pay over. *Heywood v. Northern Assur. Co.* (Minn.) 1918D-241.

(Annotated)

2. Money had and received.—Whether the action for money had and received can be maintained by a claimant of money, to recover from another claimant who has received the money, is not involved in this case. *Heywood v. Northern Assur. Co.* (Minn.) 1918D-241.

3. The question in this case is: Where one person procures a payment of money, which he knows is due to another, can the person who was entitled to receive the money maintain an action against him for money had and received? The action lies under the facts of this case, and the question stated must receive an affirmative answer. *Heywood v. Northern Assur. Co.* (Minn.) 1918D-241.

(Annotated)

4. The action does not fail because the payment did not destroy plaintiff's right of action against his debtor who has paid the money to defendant. Nor is privity or promise necessary to sustain the action. To say that the law supplies the promise is but to indulge in legal fiction. There is no place for legal fiction in modern law. *Heywood v. Northern Assur. Co.* (Minn.) 1918D-241.

(Annotated)

5. The decision of the courts of Michigan, in which state this cause of action arose, are not out of accord with this ruling. *Heywood v. Northern Assur. Co.* (Minn.) 1918D-241.

6. Necessity of quantum meruit count.—A quantum meruit count is now obsolete, and is no longer necessary in an action in assumpsit containing the common counts for work and labor done, etc. *Parkersburg, etc. Sand Co. v. Smith* (W. Va.) 1918E-449.

ATTACHMENT.

See EXECUTIONS; GARNISHMENT.

1. Levy on community property.—Where an attachment is levied upon the community property alone, it is not necessary to name the wife as a party to the attachment. *Godefroy v. Hupp* (Wash.) 1918E-494.

2. Time for moving for dissolution.—

Where no motion was made to dissolve an attachment because levied upon community property without naming the wife as a party to it, and the record shows no motion to dissolve the attachment for that reason, it is too late to seek such dissolution after it was carried into the judgment. *Godefroy v. Hupp* (Wash.) 1918E-494.

3 Effect of judgment not providing for sale.—Under L. O. L. § 308, providing that, if judgment is recovered for plaintiff, the court shall order the attached property sold to satisfy his demands, a judgment for the amount demanded, not providing that the attached property should be sold to satisfy it or preserve the attachment lien, operates as a waiver of the lien. *Smith v. Dwight* (Ore.) 1918D-563.

4. Description of property.—Under a default judgment, not providing that the attached property shall be sold to satisfy it, an attachment execution commanding the sheriff to sell the attached realty, describing the land as in "10 west," without giving the range or county in which it is situated, is not authorized by the judgment. *Smith v. Dwight* (Ore.) 1918D-563.

5. Necessity of levy.—A levy of a writ is not an essential requirement, where there is a pre-existing lien of the judgment upon the property to be sold. *Smith v. Dwight* (Ore.) 1918D-563.

6. Effect of failure to docket judgment.—Under L. O. L. § 233, directing that, when the writ of execution is against the property of the debtor, it shall be executed by levy, according to section 300, which requires a writ of attachment to be executed by delivering to the county clerk the designated certificate showing that the property has been attached, the failure to docket the judgment in the lien docket or to make any further levy is a failure to levy, where the attachment lien has been waived. *Smith v. Dwight* (Ore.) 1918D-563.

ATTESTATION.

Of wills, see **WILLS**, 3, 4.

ATTORNEYS.

1. Status, Admission and Right to Practice, 39.
2. Relation of Attorney and Client, 39.
3. Compensation of Attorneys, 40.
4. Lien of Attorneys, 40.
5. Disbarment, 41.

See **ARGUMENT AND CONDUCT OF COUNSEL**.

Attorney drawing will who is also partner of attorney for proponents of will as competent witness in probate proceedings, see **WITNESSES**, 1.

Briefs of counsel on appeal, see **APPEAL AND ERROR**, 34.

Criticism of opposing attorney in law suit as privileged communication, see **LIBEL AND SLANDER**, 12, 13.

Effect of war or irrevocable power of attorney, see **ALIENS**, 4.

Power of attorney, see **AGENCY**, 5.

Right of accused to counsel before pleading, see **CRIMINAL LAW**, 3.

Validity of contract contemplating practice of law by corporation, see **CONTRACTS**, 15.

1. Status, Admission and Right to Practice.

1. What constitutes practice of law.—A contract whereby a corporation agreed to use its best efforts to enforce claims placed with it, for collection, which contract provided for payment of an attorney's fee to the corporation on any claim placed with its legal department for enforcement and offered free legal advice, constituted an undertaking by the corporation to maintain a law department, and through such department give free legal advice and to perform the services of an attorney in collecting claims; and hence by the execution thereof the corporation held itself out to be lawfully qualified to practice law. *Creditors Nat. Clearing House v. Bannwart* (Mass.) 1918C-130.

2. Relation of Attorney and Client.

2. Estoppel to deny validity of contract of employment.—Where a husband contracted with his attorney to conduct litigation touching the community property, agreeing to pay twenty-five per cent of the proceeds, and the wife showed interest in the litigation when the attorney saw her and she inquired as to the progress of the case, she being a party plaintiff or defendant to every suit, such wife may not deny the validity of the attorney's contract for compensation with the husband on the ground she did not sign it. *Thomas v. Scougale* (Wash.) 1918C-452.

3 Validity of transaction with client.—An attorney is held to a strict accountability in all his professional relations with his clients, and any undue advantage gained by the attorney over his client by deception or undue influence while the relation exists will not be upheld by the courts. *Armstrong v. Morrow* (Wis.) 1918E-1156.

4. Where defendant was deceased's intimate friend and attorney and advised and assisted him in legal matters and business transactions for many years, it is incumbent upon him to show that in all fiduciary dealings with deceased he acted in good faith and without disadvantage to his client, and the burden is upon him to show affirmatively, either that he paid an adequate consideration for an assignment of a mortgage, or that a gratuity was intended, and that no advantage was taken of the confidential relations. *Armstrong v. Morrow* (Wis.) 1918E-1156. (Annotated)

5. That a client lived for four years after an assignment of a mortgage to his attorney without taking steps to set the assignment aside does not bar an action by his executor,

where the confidential relation and undue influence existing before the assignment continued thereafter to about the time the client died, and there was nothing to arouse him to action. *Armstrong v. Morrow* (Wis.) 1918E-1156.

3. Compensation of Attorneys.

6. Fee for collection of claim against government.—So much of the Act of March 4, 1915 (38 St. L. 996, ch. 140, § 4) as provides that not more than twenty per cent of the sum thereby appropriated to the payment of civil war damage claims shall be paid to an attorney as a fee for collecting the claim is, as to contracts made before its enactments, invalid. *Newman v. Moyers* (D. C.) 1918E-528. (Annotated)

7. Act Cong. March 4, 1915, c. 140, § 4, 38 Stat. 996, prohibiting an amount in excess of twenty per cent of the amount collected to be paid to the attorney collecting Civil War claims included under the bill, is unconstitutional and invalid, under Const. U. S. Amend. 5, as to attorneys who have performed their services and secured the allowance of claims prior to its enactment, since they have then a vested property right, which cannot be destroyed by arbitrary act of Congress. *Moyers v. Memphis* (Tenn.) 1918C-854. (Annotated)

8. Provision of Act Cong. March 4, 1915, c. 140, § 4, 38 Stat. 996, making appropriation for payment of a claim against the United States, previously allowed by the court of claims, limiting attorneys' fees for services in connection with the claim to twenty per cent of the amount appropriated, and making it unlawful to receive more, prevents action for more, the prior contract to pay the attorneys, for prosecuting the claim, a third of "the amount which may be allowed on said claim," and providing for the government paying the claim through them, and giving them a lien on the payment for the fee, creating no debt for services till the appropriation was made; the phrase in the contract "the amount which may be allowed on said claim," referring to the amount realized from the government, and not the mere allowance by the court of claims. *Ralston v. Dunaway* (Ark.) 1918C-870. (Annotated)

9. Contingent fees.—While the courts do not always favor contingent fees, and look with some suspicion upon them, especially where the amount agreed to be paid represents fifty per cent of the total claim, still the trend of judicial decision is in favor of upholding and enforcing such contracts, where no question of fraud, misrepresentation, or unfair dealing is raised. *Moyers v. Memphis* (Tenn.) 1918C-854.

10. A contract between an attorney and a city, by which the attorney is to receive fifty per cent of the amount collected from the government on a claim arising out of the Civil War, is legal and valid, and not against public policy. *Moyers v. Memphis* (Tenn.) 1918C-854.

11. An attorney whose client contracted to pay him twenty-five per cent of the proceeds

of litigation touching timber lands, and who recovered for the client, by joining in the foreclosure suit of the client's mortgagee, a one-third interest in twenty acres of land not covered by the mortgage nor by the sheriff's deed after foreclosure sale, is entitled to a quarter interest in one-third of the twenty acres. *Thomas v. Scougale* (Wash.) 1918C-452.

12. A lawyer whose client contracted to pay him twenty-five per cent of the proceeds of any suit, settlement, or compromise of the client's claim to certain property or damages, and who recovered money and property for such client through joining in a suit not originally contemplated, may recover his share of the proceeds. *Thomas v. Scougale* (Wash.) 1918C-452.

13. Reasonableness of amount.—A fee of, say, \$33,500 may be well earned in the defense of a suit for interdiction, brought by the children and heirs against their mother, contested during a period of nearly three years, involving the civil life and the liberty of the defendant and her control of an estate appraised at nearly \$350,000, and terminating in its abatement by reason of the death of the defendant. *Pons's Succession* (La.) 1918D-939. (Annotated)

4. Lien of Attorneys.

14. Necessity of notice.—The right to an attorney's lien depends upon notice of a lien upon the judgment being served upon the judgment debtor and filed, under L. O. L. § 1088. *Townsend v. Chamberlain* (Ore.) 1918C-330.

15. Settlement in violation of lien.—Under L. O. L. § 1088, touching attorney's liens, where the judgment debtor in good faith pays or satisfies the judgment before notice of the lien of the judgment creditor's attorney, the latter cannot enforce the judgment as against him. *Townsend v. Chamberlain* (Ore.) 1918C-330.

16. Where defendant judgment creditor's attorney made a motion, supported by affidavits, asserting his claim of attorney's lien and that the settlement of the judgment by his client, the judgment creditor, was in fraud of his rights, the proceeding on the motion not being part of the suit to set aside the judgment as fraudulent, plaintiffs, the judgment debtors, not being served with notice and not appearing, while the parties in interest were different from those in the action in which the judgment was rendered, the order of the court canceling the satisfaction, the affidavits, stating no fact indicating that it was obtained fraudulently, or that the settlement was invalid as to the judgment debtors, and authorizing the collection of the remainder of the judgment by the attorney, is a nullity. *Townsend v. Chamberlain* (Ore.) 1918C-330.

17. Action under federal employers' liability act.—As the federal employers' liability act authorizes actions in the state courts and makes the state practice applicable, Gen. St. Minn. 1913, § 4955, giving attorneys a lien on the cause of actions of their clients,

is properly applied to an action brought in the courts of that state under the federal act, where defendant settled the claim with the client. *Dickinson v. Stiles* (U. S.) 1918E-501. (Annotated)

5. Disbarment.

18. Power of courts.—Courts, independent of statute, have authority to punish attorneys for professional misconduct. *Chreste v. Com.* (Ky.) 1918E-122.

19. Grounds—Soliciting business.—An attorney who, knowing of testimony material to a litigant, discloses same to counsel for such litigant only upon condition that he be employed as associate counsel, is guilty of misconduct for which he should be punished. *Chreste v. Com.* (Ky.) 1918E-122. (Annotated)

20. An attorney who employs a solicitor at a weekly salary with an unlimited expense account to procure such attorney's employment in personal injury litigation is guilty of misconduct punishable by suspension or disbarment. *Chreste v. Com.* (Ky.) 1918E-122. (Annotated)

21. New Trial.—Where an attorney submitted his response in disbarment proceedings under unusual circumstances, at a time when he was in such a mental state as not to fully appreciate its effect and under a misunderstanding as to the punishment to be inflicted, it is held that he was entitled to a new trial. *Chreste v. Com.* (Ky.) 1918E-122.

AUCTION.

Agreement to purchase jointly at auction, see **CONTRACTS**, 16, 17.

AUTOMOBILES.

1. Regulation of Motor Vehicles, 41.
2. Mutual Rights and Duties on Highway:
 - a. Care Required of Pedestrians, 41.
 - b. Responsibility of Owner for Driver's Acts, 41.
 - c. Liability to Guests, 42.
 - d. Actions, 42.
3. Injuries to Motor Vehicles or Occupants, 42.
4. Crimes Incident to Operation, 43.

Automobile insurance, see **INSURANCE**, 39-44.
Automobile sales agency contracts, see **AGENCY**, 1-4, 10, 11.

Care of automobiles on ferry boats, see **FERRIES**, 4-6

Excessiveness of damages in action for injuries sustained by collision between railroad train and automobile, see **DAMAGES**, 7.

Liability of city for personal injury resulting from permitting use of streets for racing and testing automobiles, see **STREETS AND HIGHWAYS**, 10.

Measure of damages for conversion, see **CONVERSION**, 5.

Proving value of automobile, see **EVIDENCE**, 7.

Rescission of contract for purchase of automobile, see **RESCISSION, CANCELLATION AND REFORMATION**, 7.

1. Regulation of Motor Vehicles.

1. Speed regulation.—Section 12603, General Code, prohibiting the operation of a motor vehicle "at a speed greater than is reasonable or proper, having regard for width, traffic, use and the general and usual rules of such road or highway, or so as to endanger the property, life or limb of any person," is a valid statute. *State v. Schaeffer* (Ohio) 1918E-1137.

2. Requiring stop on signal.—Acts 1911, pp. 326, 327, §§ 8, 9, requiring operators of automobiles to stop when signaled by a driver of horses, etc., is constitutional. *Hays v. Hogan* (Mo.) 1918E-1127.

2. Mutual Rights and Duties on Highways.

a. Care Required of Pedestrians.

3. One passing in front of a standing street car has a right to assume that no automobile will come from the rear of the car on the left-hand side of it, in violation of ordinance. *Harris v. Johnson* (Cal.) 1918E-560.

4. The evidence is held to be sufficient to exonerate from contributory negligence one who, having passed in front of a standing street car was struck by an automobile coming from the rear, and on the left-hand side of the car. *Harris v. Johnson* (Cal.) 1918E-560.

b. Responsibility of Owner for Driver's Acts.

5. Slight deviations from route as exonerating owner.—Slight deviations from route or slight incidental things done by a chauffeur for his own benefit do not exonerate the master for negligence of the chauffeur. *Guthrie v. Holmes* (Mo.) 1918D-1123. (Annotated)

6. Presumption that driver was in scope of employment.—In an action for injuries from collision with an automobile, proof that the automobile belonged to defendant, and was being operated by defendant's regularly employed chauffeur, raises a presumption that the chauffeur was acting within the scope of his employment. *Guthrie v. Holmes* (Mo.) 1918D-1123. (Annotated)

7. In an action against the owner of an automobile for death caused by the automobile while it was being driven by his chauffeur, evidence of ownership of the car and of the fact of employment of the chauffeur by such owner is prima facie evidence of the owner's responsibility for the accident. *Rose v. Balfe* (N. Y.) 1918D-218. (Annotated)

8. Rebutting presumption.—In an action against the owner of an automobile for death caused by the automobile while it was being driven by his chauffeur, the prima facie evidence of the owner's responsibility for the

accident established by evidence of the ownership of the car and the employment of the chauffeur is overcome by substantial evidence rebutting such responsibility. *Rose v. Balfe* (N. Y.) 1918D-238. (Annotated)

9. Evidence that the owner of an automobile on leaving the city told his chauffeur at 1 o'clock to deliver several friends and drive home, a trip which would take an hour, and the chauffeur ran into and injured plaintiff at 7.30 P.M., overcomes the presumption that the chauffeur was acting within the scope of his employment at the time of the accident. *Guthrie v. Holmes* (Mo.) 1918D-1123. (Annotated)

10. Where the owner of an automobile directs his chauffeur to put the machine in dead storage under instructions not to use it without permission, the chauffeur has no implied authority to violate orders and without the owner's knowledge or consent take the car out for the purpose of testing it; and, such use being unauthorized, the owner is not liable for an accident resulting therefrom. *Rose v. Balfe* (N. Y.) 1918D-238. (Annotated)

11. In an action by one injured by an automobile in possession of defendant's chauffeur, evidence held insufficient to show that the chauffeur was acting within the scope of his employment when he ran into plaintiff, and submission of such question to the jury was error. *Guthrie v. Holmes* (Mo.) 1918D-1123. (Annotated)

12. Liability for negligence of minor son.—There is no presumption that a minor child is the agent of the father in driving the latter's car, or that when driving such car he is acting within the scope of his authority. *Hays v. Hogan* (Mo.) 1918E-1127. (Annotated)

13. A father is not liable for the negligence of a minor son in driving an automobile purchased for the use of the family, solely in furtherance of the child's own business or pleasure, and permission of the father is immaterial. *Hays v. Hogan* (Mo.) 1918E-1127. (Annotated)

c. Liability to Guests.

14. A person inviting another to ride in his automobile gratuitously is not bound to convey her safely as a common carrier. *Avery v. Thompson* (Me.) 1918E-1122. (Annotated)

15. A voluntary undertaker, such as a person inviting another to take a ride in his automobile gratuitously, is required to exercise that degree of care and caution which would seem reasonable and proper from the character of the thing undertaken, and must be mindful of the life and limb of his guest, and not unreasonably expose her to peril in addition to that involved in the act of transportation itself, because of the use of an instrumentality of tremendous power, high speed, and quick action. *Avery v. Thompson* (Me.) 1918E-1122. (Annotated)

16. Defendant's intestate invited plaintiff and others to take a ride in his automobile. As the jury might have found, he was famil-

iar with a railroad crossing and knew he was approaching such crossing, and the whistle had been blowing and the automatic bell was ringing. When within a few rods of the crossing, plaintiff called attention to the train as it came in sight around a bend, and defendant slowed down a little, looked up and saw the train, and when within a few feet of the crossing increased his speed and attempted to cross in front of the train with which he collided. It is held that the jury's finding that he unreasonably exposed plaintiff to danger and created a new peril, which she could not have anticipated and did not assume, was not palpably wrong. *Avery v. Thompson* (Me.) 1918E-1122. (Annotated)

17. Contributory negligence of guest in automobile.—It is held that the plaintiff, who had neither direction nor control of the operation of the car, and neither consented to nor acquiesced in the particular management or mismanagement that caused the accident, but who was relying on the competency of the intestate as a competent driver, and was not inattentive, being apparently the first one to perceive the train and give warning, was not negligent. *Avery v. Thompson* (Me.) 1918E-1122.

d. Actions.

18. Proof of ownership.—In an action for personal injuries caused by the negligent operation of a licensed taxicab the statement of the ownership thereof in the registry of licenses is not conclusive but may be rebutted by the person named as owner. *Kemp v. Elisha* (Eng.) 1918E-730. (Annotated)

19. Question for jury.—Whether a person inviting another to take a ride in his automobile has exercised the required degree of care is a question of fact for the jury. *Avery v. Thompson* (Me.) 1918E-1122. (Annotated)

3. Injuries to Motor Vehicles or Occupants.

20. Failure to comply with license law.—The fact that decedent was driving an unlicensed automobile at the time of the accident, in violation of the statute, does not affect the right of recovery against defendant railroad, since there was no causal relation between such violation of the statute and the wrong complained of. *Southern R. Co. v. Vaughan* (Va.) 1918D-842. (Annotated)

21. The failure of an owner and driver of an automobile to renew his license from the state does not preclude a recovery of damages for negligence of the defendant which caused the death of an occupant. *Chambers v. Minneapolis, etc. R. Co.* (N. D.) 1918C-954.

22. Contributory negligence of guest in automobile.—Where during a trip taken at night the lights of an automobile fail, and the owner and driver avails himself of the earliest opportunity to improvise or repair an oil lamp attached to the dash, after which the journey is continued, the driver being an experienced driver, and being accompanied and assisted by one who is familiar with the roads, and where the roads are muddy and

the automobile is driven slowly, it is held that a guest continuing the journey as a passenger in the rear seat of the car is not, as a matter of law, guilty of contributory negligence. *Chambers v. Minneapolis, etc. R. Co.* (N. D.) 1918C-954.

23. Noncompliance with a statutory requirement that automobiles should be supplied with two lights at the front of the car does not, as a matter of law, amount to contributory negligence on the part of a guest riding in the car. *Chambers v. Minneapolis, etc. R. Co.* (N. D.) 1918C-954.

24. Imputed negligence.—The negligence of a driver of an automobile is not imputable to a guest who is not shown to have co-operated in running the car. *Chambers v. Minneapolis, etc. R. Co.* (N. D.) 1918C-954. (Annotated)

4. Crimes Incidental to Operation.

25. Unauthorized use of automobile as larceny.—Under Penal Law, § 1293a (McKinney's Consol. Laws, Book 39, p. 469), providing that unauthorized use of an automobile shall constitute the crime of larceny, a chauffeur who uses his employer's automobile without his consent and contrary to his instructions is guilty of larceny, although the car is being driven for the purpose of testing it. *Rose v. Balfe* (N. Y.) 1918D-238.

26. Homicide by negligent operation.—In a prosecution under section 12603, General Code, for manslaughter by the negligent operation of an automobile, the court should charge the jury that the standard of conduct required of the defendant in the operation of his car is that of an ordinarily careful and prudent person, and that if he did not operate the car "at a speed greater than is reasonable or proper, having regard for width, traffic, use, and the general and usual rules of such road or highway, or so as to endanger the property, life, or limb of any person," as would appear to such ordinarily careful and prudent person in the then situation, he was not guilty of manslaughter. *State v. Schaeffer* (Ohio) 1918E-1137. (Annotated)

AWARD.

See ARBITRATION AND AWARD.

BAIL.

1. Deposit in lieu of bail—Right of depositor to reclaim.—The money deposited in lieu of bail by a third person to secure the release of one arrested and required to appear to answer a criminal charge is not conclusively regarded as the defendant's money, and when the purpose for which the deposit has been made is accomplished and the obligation discharged, or there has been a surrender of the defendant, the money is to be returned to the owner. *Campbell v. Board of County Com'rs* (Kan.) 1918D-533. (Annotated)

2. Shortly after the defendant had been released from custody by the giving of a de-

posit, he was arrested for another offense, and the officer who made the arrest, at the request of the surety who made the deposit, went with the defendant to the courthouse and in the presence of a deputy sheriff and the clerk of the district court made a formal offer of surrender which was accepted by the deputy sheriff who then took the defendant into his custody, and thereupon the clerk of the district court issued a check to the surety for the amount of the deposit, and the surety in turn signed and delivered a receipt to the clerk for the money so returned. Shortly afterward payment on the check was stopped. Held, in an action brought by the surety to recover the money he had deposited instead of bail, that the deputy sheriff had authority to accept the surrender of the defendant and that the surrender was effective although neither the sheriff nor his deputy acknowledged the surrender in writing. *Campbell v. Board of County Com'rs* (Kan.) 1918D-533. (Annotated)

3. A subsequent declaration of forfeiture because of the nonappearance of the defendant, made by the district court, to which proceeding the owner of the deposit was not a party and of which he had no notice, did not affect such owner or estop him from maintaining an action to recover the deposit. *Campbell v. Board of County Com'rs* (Kan.) 1918D-533. (Annotated)

4. Surrender of accused by bail.—A surrender of the defendant may be made to a general deputy of the sheriff, and the mere fact that a defendant has been placed under arrest by another officer because of the commission of another offense, shortly before an attempt to surrender was made, did not of itself render the attempted surrender invalid. *Campbell v. Board of County Com'rs* (Kan.) 1918D-533.

BAILMENT.

See FACTORS; PLEDGE.

1. Right of bailee to dispute bailor's title.—A bailee must return the property or its proceeds to the bailor before he can assert a claim thereto adverse to the bailor. *Black-orby v. Friend* (Minn.) 1918E-1199. (Annotated)

2. Unauthorized use by bailee as conversion.—As a general rule, if a bailee uses the subject of a bailment in a different way or to a greater extent than authorized, such unauthorized use is a conversion for which the bailor may maintain trover for the value of the chattel. *Baxter v. Woodward* (Mich.) 1918C-946. (Annotated)

3. Liability of lessor of safe deposit box.—A bailee, without any special contract to such effect, is bound to use ordinary care in keeping the deposit, although the bailor, who rents a safety deposit box, keeps the key. *Schaefer v. Washington Safety Deposit Co.* (Ill.) 1918C-906. (Annotated)

4. A safety deposit company, as bailee, must exercise such care and diligence in the preservation of the property as every prudent

man takes of his own goods of like character; the words "ordinary diligence" meaning that degree of care, attention, or exertion which under the actual circumstances a man of ordinary prudence and discretion would use, if the property were his own. *Schaefer v. Washington Safety Deposit Co.* (Ill.) 1918C-906. (Annotated)

5. The bailor's allegations that she leased a safety deposit box, paid the rent, and deposited money in the box, and when she later opened the box the money had been abstracted without her consent or knowledge, and that defendant did not use ordinary care and diligence to prevent the opening of the box by others, show a good cause of action, despite a condition of the lease that the opening of the box should not be inferable from the loss of its contents. *Schaefer v. Washington Safety Deposit Co.* (Ill.) 1918C-906. (Annotated)

6. Where a safety deposit company leases a box to plaintiff, who deposited therein money, and it is lost without her opening the box, the presumption arises that the loss was due to the company's negligence, and it has the burden of showing that it exercised due care. *Schaefer v. Washington Safety Deposit Co.* (Ill.) 1918C-906. (Annotated)

BANANA PEELS.

Liability of city for injury caused by banana peel on sidewalk, see **STREETS AND HIGHWAYS**, 12.

BANKRUPTCY.

Bankruptcy within four months of execution of note secured by deed of trust as affecting holder without notice, see **MORTGAGES**, 9.

1. **Assets—spendthrift trust.**—The equitable life interest of the beneficiary in a trust created by a bequest of a fund to a trustee to pay the entire net income thereof to the beneficiary for life "free from the interference or control of her creditors" does not pass to her trustee in bankruptcy, under the Bankrupt Act of July 1, 1898 (30 Stat. at L. 566, chap. 541, 1 Fed. St. Ann. [2d ed.] 1171), § 70a (5), vesting in the trustee all property that the bankrupt "could by any means have transferred," where the local law treats such restrictions against interference or control by creditors as limiting the character of the equitable property, and inherent in it. *Eaton v. Boston Safe Deposit, etc. Co.* (U. S.) 1918D-90. (Annotated)

2. **Effect of chattel mortgage by bankrupt.**—Where an assignment of corporate stock as collateral security was executed prior to the amendment of June 25, 1910, to the Bankruptcy Act (1 Fed. St. Ann. [2d ed.] 1115), whether the instrument be regarded as a chattel mortgage or other lien, even though it be void as to creditors for want of recordation, the trustee in bankruptcy is bound by

it as the bankrupt was. *Martin v. Bankers Trust Co.* (Ariz.) 1918E-1240.

3. The jurisdiction of a state court to foreclose a mortgage is not divested by subsequent proceedings in bankruptcy in which the bankruptcy court directs the trustee in bankruptcy to make application to intervene in the foreclosure proceeding. *Martin v. Bankers' Trust Co.* (Ariz.) 1918E-1240.

4. **Notice of failing circumstances of mortgagor.**—Where a new note secured by a deed of trust was taken by a bank in part satisfaction of an old debt, the bank does not obtain priority by the deed of trust; it having knowledge that the debtor, who was adjudged a bankrupt in less than four months, was then in failing circumstances. *Peninsula Bank v. Wolcott* (U. S.) 1918C-477.

5. The bankrupts, who were indebted to another firm, executed notes secured by a deed of trust. These notes were indorsed by a single member of the creditor firm, and were negotiated with two different banks, one of which banks already held a note of the bankrupts, which the creditor firm had indorsed to it. It is held that the court of bankruptcy had jurisdiction of a proceeding to set aside the deed of trust, though all members of the creditor firm were not parties; only that member who indorsed the second note being a party. *Peninsula Bank v. Wolcott* (U. S.) 1918C-477.

6. **Priority to wage claims—funds previously assigned.**—The provisions of the Bankruptcy Act (Act July 1, 1898, c. 541, § 64, subd. 4, 30 Stat. 563 [1 Fed. St. Ann. 2d ed. 1090]) giving priority to wages due workmen which have been earned within three months before the date of commencement of proceedings relate to distribution of assets coming into the hands of the trustee, and do not apply to moneys transferred or assigned before the bankruptcy occurred. *Riverside Contracting Co. v. New York* (N. Y.) 1918C-1075.

BANKS AND BANKING.

1. **Validity of federal reserve bank act.**—Congress did not exceed its power under U. S. Const. art. 1, § 8, clause 18, to make "all laws which shall be necessary and proper for carrying into execution" the powers expressly given by the Constitution, when giving authority to the federal reserve board by the Act of December 23, 1913 (38 Stat. at L. 262, chap. 6, 6 Fed. St. Ann. [2d ed.] 817), § 11 (k), to grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the board may prescribe. *Bay City First Nat. Bank v. Fellows* (U. S.) 1918D-1169. (Annotated)

2. **Legislative power is not unconstitutional** conferred on the federal reserve board by the Act of December 23, 1913 (38 Stat. at L. 262, chap. 6, 6 Fed. St. Ann. [2d ed.] 817), § 11 (k), giving authority to that board to grant by special permit to national banks

applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds, under such rules and regulations as the board may prescribe. *Bay City First Nat. Bank v. Fellows* (U. S.) 1918D-1169. (Annotated)

3. Quo warranto against national bank in state court.—The institution by a state attorney general in a state court of the proceeding in the nature of quo warranto to test the authority of a national bank, under the Act of December 23, 1913 (38 Stat. at L. 262, chap. 6, 6 Fed. St. Ann. [2d ed.] 817), § 11 (k), to act as trustee, executor, administrator, or registrar of stocks and bonds, is impliedly if not expressly authorized by the provisions of that section giving such power only "when not in contravention of state or local law," and of the Act of June 3, 1864 (13 Stat. at L. 116, chap. 106), § 57, now in Rev. St. § 5198 (6 Fed. St. Ann. [2d ed.] 747), making controversies concerning national banks cognizable in state courts. *Bay City First Nat. Bank v. Fellows* (U. S.) 1918D-1169.

BAR.

Of limitations, see **LIMITATION OF ACTIONS**.
Plea in bar, see **PLEADING**, 9.

BARTENDER.

What constitutes occupation of bartender within provision of insurance contract, see **LIFE INSURANCE**, 7.

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Construction of offer to baseball player, see **THEATERS AND AMUSEMENTS**, 1.
Recovery of damages from telegraph company for failure to deliver message containing offer to baseball payer, see **TELEGRAPHS AND TELEPHONES**, 7.

BASTARDY.

Settlement of bastardy proceeding as bar to action by father to recover damages for seduction, see **SEDUCTION**, 5.

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BENEFICIAL ASSOCIATIONS.

1. Regulation and Control, 45.
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Admissibility of statement of insured in last illness, see **ADMISSIONS AND DECLARATIONS**, 16.

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Joint liability of fraternal order and agent for circulating libel, see **LIBEL AND SLANDER**, 33.

Physician's death certificate as evidence, see **EVIDENCE**, 22.

Presumption of death of insured, see **DEATH**, 1.

Relief society of employees, see **MASTER AND SERVANT**, 27-34.

1. Regulation and Control.

1. Application of state insurance law.—Revisal 1905 § 4806, making all insurance contracts within the state subject to state law, does not apply to a fraternal benefit policy, in view of section 4791, making such a policy subject to charter and by-laws of the order. *Hollingsworth v. Supreme Council etc.* (N. C.) 1918E-401.

2. Foreign association.—A benefit society incorporated in another state which comes into this state in order to do business under the permission granted by the laws of Nebraska is subject to the same limitations and restrictions as such an association organized in Nebraska. *Dworak v. Supreme Lodge etc.* (Neb.) 1918D-1153.

2. Validity and Construction of Contract Generally.

3. The beneficiary of a fraternal benefit society's certificate is entitled to a liberal and favorable interpretation of the contract; for, although fraternal benefit societies are usually dealt with more liberally in some respects than ordinary insurance companies, they are subject to the same rules of law and construction as other companies in regard to their contracts for life insurance. *Greenwood v. Royal Neighbors of America* (Va.) 1918D-1002.

3. Constitution and By-laws—Amendment.

4. Effect as to existing members.—An insurance contract by a mutual benefit society, providing that the insurance is granted to the member with the distinct provision that the rights and benefits shall be subject to and governed by the constitution and by-laws of the society existing when the policy was issued, or that may be thereafter adopted or amended by the society before injury, permits any reasonable change in the rights and benefits under the contract by amendment or adoption of by-laws of the society increasing

or decreasing the dues and assessments, defining an ambiguous term in the covenant, or reasonably reducing the benefits, and such change in the by-laws is valid, if reasonable, and is to be read into the contract as if written therein. *Butler v. Eminent Household of Columbian Woodmen* (Miss.) 1918D-1137. (Annotated)

5. Where, at issuance of a beneficiary covenant by a mutual benefit insurance society, the covenant or contract of insurance and the constitution and by-laws of the society provided that the beneficiary should receive \$200 in the event of a broken leg, and thereafter such provision of the constitution of the society was amended to provide that the beneficiary should be paid \$100 in the event of complete fracture of the thigh, involving either the upper or lower extremity, or the shaft of the bone, or in the event of complete fracture of either or both bones of the lower leg (tibia, or shin bone, or fibula), at either extremity or along the center, or in event of the complete fracture of the kneecap, such amendment to the constitution, defining what was meant by a broken leg, was reasonable and proper under the provision of the insurance contract that the member's rights and benefits were subject to and governed by the constitution and by-laws of the society as existing or amended. *Butler v. Eminent Household of Columbian Woodmen* (Miss.) 1918D-1137. (Annotated)

6. Right to raise rates.—There is no statutory prohibition against the raising of the rates of a fraternal benefit association. *Hollingsworth v. Supreme Council, etc.* (N. C.) 1918E-401.

7. A member of a fraternal benefit society, having had insurance at less than the normal rates for many years, cannot urge his having borne the burden of the company against a raise in rates to make possible the payment of certificates. *Hollingsworth v. Supreme Council, etc.* (N. C.) 1918E-401. (Annotated)

8. A member of a fraternal benefit society who had free access to all books and by-laws cannot recover assessments paid, when society raised rates, on the theory that in inducing him to become a member, agent fraudulently represented that rates would not be raised, since the agent might honestly have believed so, or might not have intended to deceive, and plaintiff could have informed himself from by-laws, etc., whether raise could be made. *Hollingsworth v. Supreme Council, etc.* (N. C.) 1918E-401.

9. A member of a fraternal benefit society who had free access to all books and by-laws cannot recover assessments paid, when society raised rates, after many years' membership, on theory that it was falsely represented to him that the rates would not be raised, since his laches bar equitable relief. *Hollingsworth v. Supreme Council* (N. C.) 1918E-401.

10. What law governs.—There being no statute prohibiting a fraternal benefit society from raising its rates, and Revisal 1905, § 4791, making the charter govern the policy,

the question whether a Massachusetts company may raise rates in North Carolina involves Const. U. S. art. 4, § 1, as to full faith and credit and the decisions of the United States Supreme Court are binding on the supreme court of North Carolina. *Hollingsworth v. Supreme Council, etc.* (N. C.) 1918E-401.

11. Since no North Carolina law prohibits fraternal benefit society from raising its rates, but Revisal 1905, § 4791, makes such contracts subject to charter and by-laws of the company, a Massachusetts company whose charter and by-laws permit may raise the rate of a North Carolina member. *Hollingsworth v. Supreme Council, etc.* (N. C.) 1918E-401.

4. Suspension and Reinstatement of Members.

12. Right of member to resort to courts.—A member of a beneficial association cannot, in the absence of fraud, resort to the courts for relief against suspension before exhausting his remedies within the association. *Most Worshipful United Grand Lodge, etc. v. Lee* (Md.) 1918E-1174. (Annotated)

13. Where a beneficial association suspends a member in accordance with the proceedings established by the rules, the member has no recourse to the court; but, if proceedings have not been conducted as prescribed by the rules, and the member was given no opportunity to defend himself, the courts will interfere. *Most Worshipful United Grand Lodge, etc. v. Lee* (Md.) 1918E-1174. (Annotated)

14. Where the constitution of a lodge provides for the impeachment of the master of a subordinate lodge by charges preferred before the grand master, who, if he deems them well taken, may suspend the master and summon him before the grand lodge to answer the charges, but a master is suspended from membership on report by a committee appointed by the grand master for that purpose and confirmed by the grand lodge without any opportunity having been given to defend himself before the grand lodge, and no provision is made for appeal from such proceedings, the suspended master is entitled to relief in equity. *Most Worshipful United Grand Lodge, etc. v. Lee* (Md.) 1918-1174. (Annotated)

15. Waiver of suspension of member.—The provisions of the laws of the association limiting its liability, where a suspended member has been restored or reinstated to good standing, to injuries thereafter suffered, have no application where no suspension was declared, or where a suspension, occurring automatically by reason of the default, has been waived by the association. *Suits v. Order of United Commercial Travelers* (Minn.) 1918E-508.

16. The practice and custom of defendant, an accident benefit insurance association, in permitting and receiving from its members the payment of dues and assessments after the due date thereof, held, following *Mueller v. Grand Grove U. A. O. D.* 69 Minn. 236, not only a waiver of the failure to pay within the time fixed by the laws of the order, but also a waiver of the by-laws declaring a for-

feiture for the default and an estoppel to invoke the same in an action on the contract. *Suits v. Order of United Commercial Travelers* (Minn.) 1918E-508.

17. Reinstatement—Good health of insured.—Where a member of a fraternal benefit society allows her certificate to lapse for non-payment of dues, and thereafter, applying for reinstatement, warrants, under the terms of the certificate, that she is in good health, being, in fact, without knowledge that she was suffering from valvular disease of the heart, there is no breach of her warranty of "good health," a phrase which, used in its common and ordinary sense by a person speaking of his own condition, implies a state of health unimpaired by any serious malady of which the person himself is conscious; the warranty covering only knowingly false statements relating to health. *Greenwood v. Royal Neighbors of America* (Va.) 1918D-1002. (Annotated)

18. In an action against a fraternal beneficiary society on a benefit certificate, whether the member, when applying for reinstatement, was not in good health, is held to be for the jury under the evidence. *Greenwood v. Royal Neighbors of America* (Va.) 1918D-1002.

19. Waiver of provision.—The M. B. A., a fraternal benefit society, with lodge and insurance features, in April, 1910, received Mrs. Bailey as a member, and issued to her a benefit certificate of insurance, and assessed and collected from her, monthly, a per capita tax, reserve fund dues, and benefit assessments, up to assessment No. 11, which was due and payable during the month of November. This payment was not made until about 15 days after due, when it was made and received and retained by the company; an unconditional receipt being issued therefor. Thereafter, and for the months of December, January, February, March, and April, the company assessed her as other members in good standing and received and retained for each of said months, timely payments of the assessments and local dues, issuing unconditional receipts therefor. Mrs. Bailey died in April, without any delinquency as to payments, except as to the belated payment the previous December. Held, that the conduct of the company in retaining the belated payment, without condition, and the continued assessments and retention of payments, without condition, for several months, waived the provision that the reinstatement of a member, in default as to payments, is upon condition that such member is in good health. *Modern Brotherhood, etc. v. Bailey* (Okla.) 1918E-744.

5. Beneficiaries.

20. Law governing.—The statute of Nebraska which specifically prescribes the persons to whom payment of benefits by a fraternal beneficiary association can be made (Rev. St. 1913, § 3298), governs in all Nebraska contracts. The law of the domicile of a foreign association has no application to such contract. *Dworak v. Supreme Lodge, etc.* (Neb.) 1918D-1153. (Annotated)

6. Action to Recover Benefits.

21. Statements in proof of death.—Statement in proof of death of age of insured is not conclusive on, but may be controverted by, the beneficiary in an action on a contract of mutual benefit insurance, in the absence of facts creating an estoppel. *Armstrong v. Modern Woodmen of America* (Wash.) 1918E-263.

7. Liability for Tort of Agent.

22. Where, though a fraternal order has social, benevolent, and charitable features, it is essentially, so far as its head camp is concerned, an insurance corporation conducted on the assessment plan, and it has a benefit fund, out of which death claims are to be paid, and a general fund, which may be used for other purposes, and out of which hundreds of thousands of dollars are paid in combating an effort on the part of a portion of the members to secure the repeal of legislation raising the premium rates it is not immune from liability for a libel circulated by its officers and agents in combating such effort, on the ground that its funds are trust funds. *Morse v. Modern Woodmen of America* (Wis.) 1918D-481. (Annotated)

BENEFICIARY.

Interest of beneficiary in life insurance policy, see LIFE INSURANCE, 9.

BIDDING.

Chilling or suppressing, see CONTRACTS, 16, 17.

BILL OF EXCEPTIONS.

See APPEAL AND ERROR, 24-29.

BILL OF LADING.

See CARRIERS OF GOODS, 4.

BILL OF PARTICULARS.

In criminal cases, see INDICTMENTS AND INFORMATIONS, 12-17.

In prosecution for embezzlement, see EMBEZZLEMENT, 2, 3.

BILLS AND NOTES.

Action on lost note, see LOST INSTRUMENTS, 1-5.

1. Extension of time as discharge of accommodation maker.—The general provisions of Negotiable Instruments Law (Laws 1899, ch. 94) are: "The person primarily liable on an instrument is the person who by the terms

of the instrument is absolutely required to pay the same. All other parties are secondarily liable." Section 119 provides that a negotiable instrument is discharged: "1. By payment in due course, by or on behalf of the principal debtor; 2. By payment in due course, by the party accommodated, where the instrument is made or accepted for accommodation; 3. By the intentional cancellation thereof by the holder; 4. By any other act which will discharge a simple contract for the payment of money; 5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right." Section 120 provides that a person secondarily liable on the instrument is discharged (subsection 6): "By an agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved." It is held that a person signing a note as maker, but shown by extrinsic evidence to have been an accommodation maker was primarily liable, and is not discharged by an agreement, although made without his knowledge or consent, between the holder and maker, for valuable consideration, to extend the time of payment. *Graham v. Shephard* (Tenn.) 1918E-804.

(Annotated)

2. Shannon's Code, § 3517, providing that a surety, as a party secondarily liable, may be discharged from liability by giving the holder of the note thirty days' written notice to sue, and section 3522, providing that a surety may be discharged from liability by the principal debtor procuring a stayor to stay the judgment, in so far as they conflict with the later legislative enactment in the Negotiable Instruments Law, were repealed by that act. *Graham v. Shephard* (Tenn.) 1918E-804.

BINDING SLIP.

See **INSURANCE**, 38.

BOARDS.

Review by state boards of equalization of assessments, see **TAXATION**, 13, 16-20.

Rule of board of trade prohibiting members from dealing in grain between sessions of board at price other than closing bid as violation of anti-trust act, see **MONOPOLIES**, 1, 2.

Validity of statute creating state insurance board, see **INSURANCE**, 8-15.

BOAT LIVERY.

Liability for injury to patron, see **THEATERS AND AMUSEMENTS**, 2, 3.

BONA FIDE PURCHASER.

See **VENDOR AND PURCHASER**, 14-23.

Assignee for the benefit of creditors as bona fide purchaser, see **ASSIGNMENTS FOR BENEFIT OF CREDITORS**, 1.

BONDS.

Of building contractor, see **CONTRACTS**, 33-34.

Of persons engaged in transporting passengers in motor vehicles, see **CARRIERS OF PASSENGERS**, 20.

On appeal, see **APPEAL AND ERROR**, 111-120.

Conditional signing by sureties as defense in action on bond, see **SURETYSHIP**, 4-7.

Giving of bond by secretary of building and loan association as affecting lien of association for amount embezzled on stock held by secretary, see **BUILDING AND LOAN ASSOCIATIONS**, 7.

Liability of abstractor on bond, see **ABSTRACT OF TITLE**, 1.

Liability on bond of public officer, see **PUBLIC OFFICERS**, 15, 16.

Necessity of indemnity bond in action on lost note, see **LOST INSTRUMENTS**, 1.

Summary judgment in injunction bond, see **INJUNCTIONS**, 22, 23.

1. Provision for special fund for payment. —That special contract bonds provide for a retirement fund and an interest fund from the surplus earnings of the grantor in the deed of trust, does not make the bonds a nullity where there is a further provision that on default the bonds are enforceable against the entire mortgage property through a foreclosure suit, the appointment of a receiver, and a sale of the property. *Martin v. Bankers' Trust Co.* (Ariz.) 1918E-1240.

BOOK ACCOUNTS.

See **ACCOUNTS AND ACCOUNTING**.

BOYCOTT.

Legality, see **LABOR COMBINATIONS**, 10-12.

Distinguished from rule of labor union prohibiting members from working with nonunion material, see **LABOR COMBINATIONS**, 7.

BRIDGES.

Right of one railroad company to use bridge of another, see **RAILROADS**, 6-13.

BRIEFS.

Brief of counsel on appeal, see **APPEAL AND ERROR**, 34.

BROKERS.

1. Real Estate Brokers:
 - a. Contract of Employment, 49.
 - b. Right to Compensation, 49.
 - c. Amount of Compensation, 49.
 - d. Actions for Compensation, 49.
2. Loan Brokers, 49.

Judgment against husband and wife in action for commission on contract of husband, see **HUSBAND AND WIFE**, 22.

Oral contract for payment of commission for exchange of personal property for realty as within statute of frauds, see **FRAUDS, STATUTE OF**, 3.

1. Real Estate Brokers.

a. Contract of Employment.

1. Severable contract.—An agreement to pay a broker commission for effecting an exchange of properties, whereon the owner gives the broker a list of his properties, placing separate valuations on each, without an agreement, making the right to a commission for the exchange of stock dependent on the sale or exchange of realty, or anything to make the right dependent on the sale or exchange of the stock separate from the realty, is severable. *Godefroy v. Hupp* (Wash.) 1918E-494. (Annotated)

2. Right to revoke authority.—A contract which makes one the agent of the owner of land for the sale thereof is simply a listing contract, revocable at any time by the owner, and notice of revocation terminates the rights under the contract. *Fields v. Vizard Invest. Co.* (Ky.) 1918D-336. (Annotated)

b. Right to Compensation.

3. Performance variant from contract.—The fact that an exchange as finally concluded did not embrace all of the realty included in defendant's list given to the broker, and did include certain machinery, a team, harness, and wagon, not included in the list, will not defeat the action for a commission, if the contract was in writing, where the exchange was concluded along lines contemplated in the correspondence of the broker's agent with the other party, which was submitted to defendant and led to his closing the deal. *Godefroy v. Hupp* (Wash.) 1918E-494.

4. Implied contract to pay commission.—In a broker's action, on the theory that defendants, by refusing to perform a contract of sale, became indebted to him for services in procuring the purchaser, evidence is held not to show any contractual relation between the broker and defendants. *Dickinson v. Hanley* (Mich.) 1918C-1063. (Annotated)

5. Where a broker is a mere volunteer, hoping to get a commission out of the purchaser, whom he procured, defendants' misrepresentation as to the authority of a defendant to make the sale cannot be made the basis of an action in the broker's behalf. *Dickinson v. Hanley* (Mich.) 1918C-1063. (Annotated)

Ann Cas. Dig. 1918C-E.—4.

c. Amount of Compensation.

6. In absence of express contract.—Where an agreement to pay broker a commission for effecting an exchange of properties is silent as to rate of commission to be paid, it was implied that the rate should be such as is usually and customarily paid at that place for an exchange or sale of such stocks. *Godefroy v. Hupp* (Wash.) 1918E-494.

d. Actions for Compensation.

7. Evidence.—In a broker's action for commissions for effecting an exchange of personal property for realty, the written contract of exchange is not conclusive as to the value of the stock, so that, where it fixes no separate value on any of the properties, no commission is recoverable, since the broker, being a stranger to the contract, is not bound by it, and may prove by parol the value of the stock. *Godefroy v. Hupp* (Wash.) 1918E-494.

8. In an action for a broker's commission, it is held on the evidence, that the appellate court would not disturb a verdict for plaintiff for insufficiency of the evidence to establish the rate of commission allowed by the jury. *Godefroy v. Hupp* (Wash.) 1918E-494.

9. Questions for jury.—On evidence in a broker's action for services rendered in an exchange of personal property for realty, whether the plaintiff, through his employee, was the procuring cause of the exchange as finally consummated is held to be a question for the jury. *Godefroy v. Hupp* (Wash.) 1918E-494.

10. Whether a contract with a broker for commissions for an exchange of property is divisible in respect to personalty and realty is a question of law depending on the terms of the contract, but what such terms are is a question of fact on the evidence. *Godefroy v. Hupp* (Wash.) 1918E-494. (Annotated)

11. In an action upon an oral contract for service as a broker in effecting an exchange of properties, it is held, on the evidence, that whether the defendant agreed to pay a commission on any sale or exchange of its property, whether of stock alone, real property alone, or of the stock and real property together, was for the jury. *Godefroy v. Hupp* (Wash.) 1918E-494.

12. In broker's action for his commission for effecting an exchange of stock for realty, conflicting evidence, tending to show that certain mill stock was put in at \$45,000 and certain oil stock at \$15,000, is sufficient to take the valuation of such stock to the jury. *Godefroy v. Hupp* (Wash.) 1918E-494.

2. Loan Brokers.

13. Sufficiency of performance.—In a broker's action for commissions for procuring a loan, evidence as to whether it was understood that plaintiff was acting as broker and not for himself, and that a commission mentioned in the negotiations was a commission for procuring the loan and not part of the consideration for the loan, if made, and as to whether a loan was agreed upon, or whether it was to be contingent upon a purchase of

land by defendant, is held to make a question for the jury as to plaintiff's right to recover. *Parker v. Power* (Md.) 1918C-604.

(Annotated)

BUILDING AND LOAN ASSOCIATIONS.

1. **Lien on stock—Effect of by-law.**—Code, § 1626 provides that the transfer of shares of corporate stock is not valid except as between the parties until regularly entered upon the books of the company, and that, when any shares of stock shall be transferred as collateral security, the transferee may notify in writing the secretary of the corporation, and from the time or such notice, and until written notice that the stock has ceased to be held as collateral security, the stock shall be considered in law as transferred on the books of the corporation without an actual transfer. It is held that where the by-laws of a building and loan association gave the association a lien on shares of stock for any indebtedness to it from the shareholder, the giving of the statutory notice by a pledgee of stock did not extinguish the association's lien for an indebtedness then existing, or give the pledgee priority over the association for the amount the shareholder owed the association at the time of the pledge. *Jewell v. Nuhn* (Iowa) 1918D-356. (Annotated)

2. A building and loan association, which delivered to a stockholder a passbook purporting to contain a copy of the articles of incorporation and the by-laws, but not including therein a provision in the by-laws giving the association a lien on the shares of stock for the shareholders' indebtedness to it, is not thereby estopped from asserting such lien on the shares of another stockholder which were pledged to the stockholder in question as collateral security, as he had power by going to the record to find out what the by-laws were, and was charged with notice of the by-laws on record in the office of the proper recorder of deeds, especially where the certificate of stock assigned to him as collateral contained the provision of the by-laws respecting such lien. *Jewell v. Nuhn* (Iowa) 1918D-556. (Annotated)

3. Where a pledgee of stock in a building and loan association is himself a stockholder, the by-laws are notice to him of a lien on the stock in favor of the association thereby created. *Jewell v. Nuhn* (Iowa) 1918D-356. (Annotated)

4. **What constitutes debt for which lien given.**—Under a by-law of a building and loan association giving the association a lien on stock for sums due it from the shareholder on his subscription to the stock or for money loaned by it to him or for any other indebtedness due from him, and providing that no stock shall be transferred unless all debts due the association are first paid, a claim against a shareholder for an amount embezzled by him while secretary of the association is a "debt" as against a voluntary pledgee of the secretary's stock, especially

where the embezzlement is conceded, and it appears that at the time the stock was pledged the amount of the embezzlement exceeded the value of the stock pledged. *Jewell v. Nuhn* (Iowa) 1918D-356. (Annotated)

5. Even though such claim is not a debt until reduced to judgment, this does not affect the priority of the association's lien, but merely postpones its enforcement until the demand is reduced to judgment, as the by-laws create a lien for future as well as present indebtedness. *Jewell v. Nuhn* (Iowa) 1918D-356. (Annotated)

6. Where the by-laws of an incorporated building and loan association provide that the association shall have a lien on its stock for any sum due from the shareholder on account of the subscription to the stock or for money loaned by the association to the shareholder or for any other indebtedness due from the shareholder, and that no stock shall be transferred unless all debts due the association are first paid, if, under the law, a pledgee of stock is justified in believing that the language of the by-laws mean a debt, in strictness, he has a right to treat the language as having such meaning, and may object to a different interpretation extending the lien to the liability of the shareholder for money embezzled by him as secretary of the association. *Jewell v. Nuhn* (Iowa) 1918D-356. (Annotated)

7. Where the by-laws of a building and loan association provide that the association shall have a lien on the shares of each shareholder for any sum due it from him either on account of the subscription to the stock or for money loaned by it to him or for any other indebtedness due from the shareholder, and that no stock shall be transferred unless all debts due the association are first paid, the association has a lien on the stock of a shareholder for an amount embezzled by him while secretary of the association, and the fact that the secretary is bonded does not prevent such lien, as it is the fact of an indebtedness due from a member of the class subject to the lien, and not the capacity in which he becomes indebted, that controls, and, in the absence of any evidence that the bonds were relied on exclusively, there is no reason for assuming that it was not the intent of the association to create a lien on the shares because of the fact that a bond was taken. *Jewell v. Nuhn* (Iowa) 1918D-356. (Annotated)

8. **Estoppel.**—That a stockholder in a building and loan association with whom another stockholder pledged his stock as collateral security was sent statements showing that the books of the association had been audited, and that, from an examination of the books and accounts of the secretary and treasurer, the person making the audit found nothing to indicate a lack of faithful performance of duty on the part of such officers, does not estop the association from asserting a lien on the pledged stock for an amount embezzled by the pledgor while secretary of the association, since the persons making the audit and mailing the statements to the pledgee were his agents as well as the agents

of his fellow stockholders. *Jewell v. Nuhn* (Iowa) 1918D-356. (Annotated)

BUILDING CONTRACTS.

See **CONTRACTS**, 24-36.
See **MECHANICS' LIENS**, 1-15.
Assignment of proceeds of claims on building contracts, see **ASSIGNMENTS**, 3-14.
Subrogation of surety of contractor, see **SUBROGATION**, 3.

BUILDINGS.

Destruction during erection as affecting right of contractor to compensation, see **CONTRACTS**, 28-30, 32.
Party wall rights, see **ADJOINING LANDOWNERS**, 1-3.

BURDEN OF PROOF.

See **EVIDENCE**, 39.

BURYING GROUNDS.

See **CEMETERIES**.

BUSINESS.

Injunction against criminal prosecution on account of injury to business, see **INJUNCTIONS**, 12.
Power to regulate as including power to license, see **LICENSES**, 2.
Regulation of business, see **CONSTITUTIONAL LAW**, 6-9.

BUTCHER.

Licensing, see **LICENCES**, 4-6.

BY-LAWS.

See **BUILDING AND LOAN ASSOCIATIONS**, 1-11, 15, 16.
Conflict between policy and by-laws of beneficial association, see **INSURANCE**, 50.

CALL.

Necessity of notice to call for unpaid stock subscriptions, see **CORPORATIONS**, 31.

CANCELLATION.

See **RESCISSION, CANCELLATION AND REFORMATION**.

CANDIDATES.

Criticism of candidates for office as libel or slander, see **LIBEL AND SLANDER**, 1, 7-9, 25, 26.
Withdrawal of candidacy, see **ELECTIONS**, 11-13.

CAPIAS AD RESPONDENDUM.

Raising question of error in refusal to quash writ of capias ad respondendum, see **APPEAL AND ERROR**, 63.

CARRIERS.

See **CARRIERS OF GOODS; CARRIERS OF LIVE STOCK; CARRIERS OF PASSENGERS; FERRIES; RAILROADS; STREET RAILWAYS**.
Effect of partial invalidity of Reciprocal Demurrage Act, see **STATUTES**, 8.
Nature of duty owed to person riding in automobile as guest, see **AUTOMOBILES**, 14.
Right of individual or corporation to use streets as common carriers, see **STREETS AND HIGHWAYS**, 2-6.

1. Regulation of rates.—In considering the reasonableness of a rate fixed by the railroad commissioners for the transportation of any particular class of freight, the question is whether the entire revenue produced from the particular traffic affords a substantial income for the service over the cost of rendering it. *State v. Florida East Coast R. Co. (Fla.) 1918E-1206*. (Annotated)

2. In ascertaining the cost to or expense incurred by a railroad carrier in handling a particular class of traffic, interest on bonds and taxes should not be included in the estimate, but they are matters to be considered in determining whether the rate to be enforced provides a reasonable or fair compensation. *State v. Florida East Coast R. Co. (Fla.) 1918E-1206*. (Annotated)

3. Where the reasonableness of a rate fixed by the railroad commissioners for the transportation of a particular class of freight is attacked by the carrier, against whom it is sought to be enforced, upon the ground that the rate prescribed will require the carrier to perform a service without reasonable compensation therefor, or upon the ground that the order was made without any evidence to support it, the burden is upon the carrier to establish by evidence which is clear and satisfactory such ground of defense. *State v. Florida East Coast R. Co. (Fla.) 1918E-1206*.

4. Evidence examined, and found not to show clearly and satisfactorily that the order made by the railroad commissioners, affecting the carriage of commodities included in Class P traffic by the respondent railroad, would compel the respondent to carry such commodities at a loss, or without substantial compensation. *State v. Florida East Coast R. Co. (Fla.) 1918E-1206*.

5. Presumption in favor of order.—The orders of the railroad commissioners prescribing

ing a rate to be charged by railroad corporations for the transportation of freight, being within the scope of the railroad commissioners' power, are prima facie reasonable and just, and properly made and arrived at in due form of procedure, and such as ought to have been made in the premises. *State v. Florida East Coast R. Co. (Fla.) 1918E-1206.*

6. Testimony of commissioners to show regularity.—Upon the question of whether the railroad commissioners made an order relating to the carriage of freight by railroad carriers without any evidence before them upon which to base such order, they may be called as witnesses, and required to testify whether in fact any evidence was submitted to and considered by them as the basis for such order. *State v. Florida East Coast R. Co. (Fla.) 1918E-1206.*

7. Reciprocal demurrage act—Construction.—Section 6162, Rev. St. 1913, construed, and held that the duty of a railway company to make prompt delivery of cars is not ended when the cars are placed upon a "hold track" to await orders from the consignor or consignee, but the running of the time allowed by such section for delivery is only suspended while cars are so held. *Sunderland Bros. Co. v. Missouri Pac. R. Co. (Neb.) 1918D-1120.*

CARRIERS OF GOODS.

1. Transportation and Delivery to Consignee, 52.
2. Bills of Lading, 52.
3. Loss of or Injury to Goods, 52.
4. Limitation of Liability, 52.
5. Charges, 53.
6. Connecting Carriers, 53.
7. Actions for Loss, Injury or Delay:
 - a. In General, 53.
 - b. Evidence, 53.
 - c. Damages, 54.

See CARRIERS; CARRIERS OF LIVE STOCK.

Duty to make prompt delivery of cars under Reciprocal Demurrage Act, see CARRIERS, 7.

1. Transportation and Delivery to Consignee.

1. The liabilities of a carrier depend, not only on its contract, but also on obligations imposed by law, and the law imposes the duty upon a carrier to transport and deliver to the consignee within a reasonable time goods which have been intrusted to it. *Florida East Coast R. Co. v. Peters (Fla.) 1918D-121.*

2. Unexpected congestion of traffic.—When an emergency arises and a carrier unexpectedly has more business than it can accommodate, and it receives goods without notice to the shipper on the probable delay, and fails to obtain his assent, express or implied, to the delay, it is bound to transport the goods within a reasonable time, notwith-

standing the emergency. *Florida East Coast R. Co. v. Peters (Fla.) 1918D-121.*

(Annotated)

3. Delay of consignee in removing goods.—Where potatoes shipped by rail and steamer have been in the steamship company's warehouse at destination to the knowledge of the consignee more than six days, the railroad which handled the shipment is not liable for loss by freezing; its carrier's liability having terminated. *Barber v. Detroit, etc. R. Co. (Mich.) 1918E-1109.* (Annotated)

2. Bills of Lading.

4. Effect of filing with interstate commerce commission.—While the legal conditions and limitations in a railroad company's bill of lading, the form of which was duly filed with the interstate commerce commission as part of its tariffs, are binding until changed by that body, illegal conditions and limitations are void though so filed. *Boston, etc. R. Co. v. Piper (U. S.) 1918E-469.*

3. Loss of or Injury to Goods.

5. Proximate cause of damage.—Where potatoes shipped by rail reached destination three days late, but it could not be said with any certainty that if they had reached destination on schedule none of them would have been frozen, the railroad was not liable to the shippers for damages from freezing. *Barber v. Detroit, etc. R. Co. (Mich.) 1918E-1109.*

4. Limitation of Liability.

6. Notice of claim—Construction of contract.—A contract between a carrier and shipper for the transportation of goods, containing the following stipulation: Claims for loss or damage must be made in writing to this company within ten days after arrival of the goods at their place of ultimate destination in case of fruit, vegetables, and other perishable articles, and within thirty days after arrival at ultimate destination in case of other freight, and unless claims are so made this company shall not be liable—even if valid and enforceable—relates only to claims for the loss of or injury to goods, and has no applicability to an action for special damages occasioned by negligent delay in the transportation of goods. *Florida East Coast R. Co. v. Peters (Fla.) 1918D-121.*

7. Sufficiency of notice.—In a consignee's action for damages to tomatoes shipped under a bill of lading, requiring notice of a claim for damage to be made in writing to the agent at place of delivery upon arrival, or within ten days after delivery, the consignee's timely presentation of a written statement of a report of their condition, signed by the carrier's inspector, bearing the name of the consignee, stating the damage and manner in which it occurred, and that the consignee would repack the tomatoes and claim damages, is a sufficient notice. *United Brokers Co. v. Southern Pac. Co. (Ore.) 1918D-814.*

(Annotated)

8. A stipulation as to notice of a claim

for injury to goods while being transported by a common carrier should be given a reasonable construction, and a substantial compliance therewith is all that is required, in view of the object of the requirement of notice. *United Brokers Co. v. Southern Pac. Co. (Ore.)* 1918D-814. (Annotated)

5. Charges.

9. Liability of consignee for freight charge.

—The consignor or shipper is primarily liable to the carrier for the freight. But if the consignee, the presumed owner, accepts an interstate shipment and pays part of the freight, the law implies an agreement on his part to pay the balance to the carrier, where, as here, the carrier, at the time of the delivery of the shipment, has no knowledge of the arrangement between the consignor and consignee as to the payment of the freight, and the consignor then is and ever since has been insolvent. *Chicago, etc. R. Co. v. Greenberg (Minn.)* 1918E-456.

10. In an action by a railroad company to recover a balance of the legal freight upon an interstate shipment from the consignee who had accepted the shipment, paid the amount of the freight erroneously understated in the bill of lading, and settled with the consignor upon that basis, the defense of estoppel is not available, for the consignee is conclusively presumed to have had knowledge of the published legal rate. *Chicago, etc. R. Co. v. Greenberg (Minn.)* 1918E-456.

(Annotated)

6. Connecting Carriers.

11. Presumption against terminal carrier.

—Without evidence locating the place of the damage to goods in transit over several connecting lines, and where it appears that the goods were delivered to the initial carrier in good condition, and were delivered by the terminal carrier in a damaged condition, a presumption arises that they were injured on the line of the terminal carrier, and the burden of proof is on it to show that the damage was not done on its line, and that it occurred without its fault or through the shipper's failure to perform his contract. *United Brokers Co. v. Southern Pac. Co. (Ore.)* 1918D-814.

7. Actions for Loss, Injury or Delay.

a. In General.

12. Persons entitled to sue.—In order to maintain an action against a carrier for the recovery of damages occasioned by negligence in the transportation or delivery of goods, either *ex contractu* or *ex delicto*, the plaintiff does not have to be the absolute owner of the goods. If the plaintiff has a special interest therein and his legal rights have been invaded, that would entitle him to maintain the action. *Florida East Coast R. Co. v. Peters (Fla.)* 1918D-121.

13. Where goods are intrusted to a carrier for transportation and delivery, the carrier thereby has notice of the interest of both

the consignor and the consignee; and, if either suffers an injury through the negligent delay in the transportation or delivery of the goods, the person so suffering such injury may bring an action against the carrier to obtain redress for such injury. *Florida East Coast R. Co. v. Peters (Fla.)* 1918D-121.

14. As a general rule, the consignee is *prima facie* entitled to bring an action against a carrier for the loss of or injury to goods or for negligent delay in their transportation or delivery, since it is a presumption of law that on the delivery of goods to a carrier the title thereto vests in the consignee, and when the consignee is the party who has been damaged, with which damage the consignor has no especial concern, the consignee is the proper party plaintiff, especially in an action *ex delicto*. *Florida East Coast R. Co. v. Peters. (Fla.)* 1918D 121.

15 The common-law rule was that an action for a tort must in general be brought in the name of the person whose legal rights has been infringed. Where the consignee has suffered special damages from the negligent delay in the transportation or delivery of goods by a carrier, the consignee is the proper party plaintiff in an action *ex delicto*, being "the real party in interest" within the intent and meaning of section 1365 of the General Statutes of 1906, providing that "any civil action at law may be maintained in the name of the real party in interest." *Florida East Coast R. Co. v. Peters (Fla.)* 1918D 121.

b. Evidence.

16. Burden of proof.—In an action by the consignee against a carrier for the recovery of damages occasioned by the negligent delay of the carrier in the transportation and delivery to the consignee of several shipments of crate material for the use of the consignee in the shipment of his crop of tomatoes, it is incumbent upon the plaintiff to prove by competent evidence the amount of damages which he has suffered as a proximate result of such negligent delay. *Florida East Coast R. Co. v. Peters (Fla.)* 1918D-121.

17. Proof of damage.—In a consignee's action against a carrier for damages to a shipment of tomatoes, the consignee's bills and the ledger account, showing the amount charged to the parties to whom the tomatoes were sold, presumably on account of their damaged condition, without evidence to show that the items represented the actual damage, are properly excluded. *United Brokers Co. v. Southern Pac. Co. (Ore.)* 1918D-814.

18. In an action by a consignee against a carrier for the recovery of damages occasioned by negligent delay in the transportation of crate material to be used by the consignee in the shipment of tomatoes, it is error to permit the plaintiff to testify, over the objection of the defendant, as to what amount of fertilizing material he had used in making his crop and of what such material consisted; such testimony not being pertinent

to the issues. *Florida East Coast R. Co. v. Peters (Fla.) 1918D-121.*

19. Evidence as to preliminary negotiations.—In an action by a consignee against a carrier for the recovery of damages occasioned by negligent delay in the transportation of goods, it may not constitute reversible error to permit the plaintiff to introduce documentary evidence, consisting of letters and telegrams which had passed between the plaintiff and the defendant, even if this evidence was incomplete in itself, and insufficient to show knowledge or notice to the defendant of any special damages which the plaintiff might sustain by reason of delay in the transportation, since such evidence tended to throw light upon the preliminary negotiations taking place between the plaintiff and the defendant and to explain the subsequent notice which was given to the defendant. This may likewise be true as to testimony of conversations between the plaintiff and the defendant. *Florida East Coast R. Co. v. Peters (Fla.) 1918D-121.*

c. Damages.

20. Special damages—Notice.—In an action against a carrier for the recovery of damages occasioned by the negligent delay in the transportation of goods, whether brought by the consignor or consignee, only such damages may be recovered as were contemplated or might reasonably be supposed to have entered into the contemplation of the parties to the contract of carriage. In order to charge the carrier with any special damages, it is incumbent upon the plaintiff to show that at the time of the shipment of the goods the carrier had notice or knowledge of such special facts and circumstances as to require expedition in the transportation of the goods, and that special damages would ensue by reason of negligent delay. *Florida East Coast R. Co. v. Peters (Fla.) 1918D-121.*

21. Notification of express company, upon delivery to it for shipment of moving picture films, that the films are to be "rushed" because they were to be exhibited, is insufficient basis to render the express company, upon delay in such shipment, liable for special damages, consisting of the receipts or profits which the consignee lost by nonattendance in his theater owing to failure to receive the films in time to exhibit them as advertised, based on evidence that the pictures shown by the films were of an unusually attractive character, had been specially advertised to be exhibited, and would have been attended by a large number of persons paying a higher price than was charged for admission to the pictures necessarily shown in lieu of those shipped; such notification not being sufficient to show that such damages were within the reasonable contemplation of the parties. *Chapman v. Fargo (N. Y.) 1918E-1054.*

(Annotated)

22. In an action by a consignee against a carrier for the recovery of damages occasioned by negligent delay in the transportation of crate material, it is harmful error to charge that special damages may be re-

covered as to which no notice was given though such charge included a reference to special damages arising from the receipt of other crates after the notice was given. And this error is not rendered harmless by a subsequent charge that special damages cannot be recovered where it is not shown that notice was given of the anticipated special damages. *Florida East Coast R. Co. v. Peters (Fla.) 1918D-121.*

23. In action by a consignee against a carrier for the recovery of damages occasioned by negligent delay in the transportation of crate material, unless the carrier had at or before the receipt of the crates for transportation knowledge or notice of the particular special damages that would result from an unreasonable delay in the transportation, such special damages are not recoverable; and, if several elements of unusual or special damages would proximately result from the negligence, there must have been notice or knowledge as to each such element of damages as a probable result of the stated negligence before liability for such special damages arises in law. Where notice was given to the carrier of probable special damages as a result of unreasonable delay in transporting crate material after some shipments of such crate material had already been delivered to the carrier, such notice cannot be held to relate back, and the carrier would be liable only for special damages as for shipments received after such notice was given to it. *Florida East Coast R. Co. v. Peters (Fla.) 1918D-121.*

24. It is doubtless true that common carriers are supposed to take notice of such natural events as are familiar to ordinary people. They will be held to a knowledge of seedtime and harvest, and of the general customs relating thereto in the territory where they do business. Even so, knowledge by a carrier of the fact that a shipper on its line has about four hundred acres planted in tomatoes would not carry with it the additional knowledge when such tomatoes would be ready for the shipment thereof to begin or when the shipper would need crates, the number thereof that he would need, or that a few days' delay in the transportation thereof would result in special damages to such shipper. *Florida East Coast R. Co. v. Peters (Fla.) 1918D-121.*

25. Where losses and injuries are not a necessary, or a usual and ordinary, but a proximate though unusual, result of actionable negligence, such losses and injuries may be compensated for by the recovery of special damages; but the negligent party cannot lawfully be made to respond in damages for losses that do not usually result from or could not ordinarily have been foreseen as a proximate result of a particular negligence, unless it be shown that there was knowledge or notice on the part of the negligent person that such losses would or might follow as a proximate result of a particular negligence. *Florida East Coast R. Co. v. Peters (Fla.) 1918D-121.*

CARRIERS OF LIVE STOCK.

See CARRIERS; CARRIERS OF GOODS.

1. Deviation from agreed method of transportation.—The contract of carriage by express of a car of horses is abandoned by the carrier putting it in a freight train, so that, notwithstanding stipulation of the contract, on which the rate is based, that the carrier's liability shall in no event exceed the agreed valuation of \$100 for each horse, the shipper may recover the entire damage to them, and this though it is an interstate shipment. *Reynolds v. Adams Express Co.* (N. C.) 1918C-1071. (Annotated)

2. Limitation of liability.—Validity.—A provision in a uniform live stock agreement filed with the Interstate Commerce Commission and covering an interstate shipment which limited the shipper's damages for unusual delay resulting from negligence to the amount actually expended by the shipper in the purchase of food or water for the stock while detained is invalid as a contract exempting the carrier from liability for its own negligence, and cannot be sustained as a contract limiting recovery to an agreed valuation in consideration of a reduced rate. *Boston, etc. R. Co. v. Piper* (U. S.) 1918E-469. (Annotated)

3. Waiver of notice of claim.—Requirement, in contract of shipment for written notice of claim within thirty days will be regarded waived, where the carrier's agents are fully cognizant of the injury to the horse shipped and the attendant circumstances, and the carrier sends a veterinary surgeon to treat it. *Reynolds v. Adams Express Co.* (N. C.) 1918C-1071.

CARRIERS OF PASSENGERS.

1. Tickets and Fares, 55.

2. Duty in Carriage of Passengers:

- a. Duties and Liabilities in General, 55.
- b. To Protect Passengers, 56.
- c. To Passenger Boarding or Alighting, 56.

3. Ejection, 56.

4. Contributory Negligence, 56.

5. Actions for Injuries, 56.

6. jitneys and Taxis, 56.

See CARRIERS; FERRIES; STREET RAILROADS.

1. Tickets and Fares.

1. Tender.—A passenger need not tender the exact fare, but, if he tenders a reasonable sum, the carrier must accept it and furnish change; what is a reasonable sum depending largely upon whether the carrier is a steam railroad or a street railway, and upon the ease or difficulty in handling passengers in each locality. *Jones v. Louisville R. Co.* (Miss.) 1918D-180. (Annotated)

2. Where plaintiff tendered the defendant's conductor a \$100 bill, with the request that the conductor return the necessary change when they reached destination, the size of

the bill is immaterial to the question of the reasonableness of the amount tendered. *Jones v. Louisville, etc. R. Co.* (Miss.) 1918D-180. (Annotated)

3. Requiring deposit of fare in box.—It is a reasonable rule for a street railroad to require its passengers personally to deposit the fare in a coin and ticket collection box before entering the car when such regulation is intended to facilitate traffic. *Virginia R. etc. Co. v. O'Flaherty* (Va.) 1918D-471. (Annotated)

4. Enforcement of rule.—Under Code 1904, § 1294d, providing that each conductor and motorman on cars of a street railroad shall be a special policeman, and have all the powers of conservators of the peace, when a passenger enters the car without paying his fare, and refuses to deposit it in the coin and ticket collection box provided for the purpose, as required by the rules of the company, the conductor may detain him and carry him to the end of the line, and there turn him over to a regular police officer. *Virginia R. etc. Co. v. O'Flaherty* (Va.) 1918D-471.

2. Duty in Carriage of Passengers.

a. Duties and Liabilities in General.

5. The degree of care imposed on a carrier of passengers, such as a street railway, by law and on grounds of sound public policy, is the exercise of the utmost diligent skill and foresight. *Memphis St. R. Co. v. Cavell* (Tenn.) 1918C-42.

6. Duty as to doors.—A railroad common carrier is not bound to prevent its doors, after being opened by others, from closing when its train is in motion, and it commonly has no reason to expect passengers to be standing on the platform. *Shaughnessy v. Boston, etc. R. Co.* (Mass.) 1918C-376. (Annotated)

7. Where a passenger on defendant railroad, as the train approached her destination, and while it was several hundred feet away, left her seat and went through the open door to the platform and stood there with her hand on the jamb of the door to steady herself, and, when the train stopped in its usual manner, the door swung against her fingers and injured them, it is held that there was no negligence making the carrier liable. *Shaughnessy v. Boston, etc. R. Co.* (Mass.) 1918C-376. (Annotated)

8. In such case, there is no ground for the application of the doctrine of *res ipsa loquitur*. *Shaughnessy v. Boston, etc. R. Co.* (Mass.) 1918C-376. (Annotated)

9. Concurring negligence of other railroad.—The negligence of a railroad in running a freight over a street railway crossing does not excuse such street railway, whose conductor was negligent in not making sure of the approach of the freight before attempting to cross, from liability to an injured passenger, since the passenger's injuries were the proximate result of the conductor's failure

to discharge his duty. *Memphis St. R. Co. v. Cavell* (Tenn.) 1918C-42.

(Annotated)

b. To Protect Passengers.

10. Proximate cause.—A railroad is not liable to a passenger assaulted and robbed on its train, the cars being without light and badly overcrowded, there being no causal connection between the road's supposed negligent act in overcrowding and failing to light its cars and the injury charged to have resulted therefrom. *Chancey v. Norfolk, etc. R. Co.* (N. C.) 1918E-580.

(Annotated)

c. To Passenger Boarding or Alighting.

11. Allowing time to find seats.—A common carrier does not as a matter of law owe the duty of stopping its trains at stations for a time sufficiently long to enable passengers who have gotten on safely to find seats. *Blume v. Chicago, etc. R. Co.* (Minn.) 1918D-297.

3. Ejection.

12. Reasonableness of tender.—In an action for wrongful ejection from defendant's train for refusal to pay a train fare of four cents a mile, after the defendant's ticket agent at a union station had refused to change a \$100 bill tendered by plaintiff in payment of a fare of \$2.01, at three cents a mile, the evidence is held to make the reasonableness of the sum tendered a question for the jury. *Jones v. Louisville* (Miss.) 1918D-180.

(Annotated)

13. Violation of rules.—A street car company's rule that its conductor should request passengers to enter the car and move forward and endeavor to keep the rear platform clear at all times, adopted to promote the safety of passengers and the efficiency of the service, is a proper and reasonable rule to which passengers are bound to conform when its requirements can be reasonably enforced; so that, where plaintiff, on request, refused to leave the rear platform and enter the car, where there was standing room, though at the rear entrance it appeared to be crowded, and the conductor, after a repeated request, attempted to put him off, but did not succeed, and did not make any wanton or reckless assault, plaintiff cannot recover. *Combs v. Southern Wisconsin R. Co.* (Wis.) 1918C-532.

(Annotated)

4. Contributory Negligence.

14. A passenger on a steam railroad is not justified in incurring risks unnecessarily, however small the chance may be that he will suffer thereby. *Shaughnessy v. Boston etc. R. Co.* (Mass.) 1918C-376.

5. Actions for Injuries.

15. Questions for jury.—Where the motor-man of the defendant carrier knew that passengers were upon the left-hand running board, that he was on a curve, and that the

other defendant's car of unusual width was approaching, the question of the defendant's negligence is for the jury. *Walsh v. Boston El. R. Co.* (Mass.) 1918C-443.

16. The negligence of the defendant, whose car, moving on an adjoining track in the opposite direction, struck plaintiffs is for the jury. *Walsh v. Boston El. R. Co.* (Mass.) 1918C-443.

17. Evidence in an action for personal injury from collision with a car of the other defendant on an adjoining track, while riding on the left-hand running board of the defendant carrier's car, is held to make the plaintiffs' contributory negligence in riding in such position for the jury. *Walsh v. Boston El. R. Co.* (Mass.) 1918C-443.

(Annotated)

18. In an action against a street railway for injuries to a passenger, where, under all the evidence, no reasonable difference of opinion can exist as to the negligent character of the acts of defendant's employees at a railroad crossing under the particular circumstances and at a particular time, the act is negligent in law, and there is no issue for the jury on the question of the negligence. *Memphis St. R. Co. v. Cavell* (Tenn.) 1918C-42.

6. jitneys and Taxis.

19. Regulation.—One formerly engaged in operating a motor vehicle for hire upon the streets of Seattle, having complied with Laws 1915, p. 227 (Rem. Code 1915, § 5562-37 et seq.), but who is now unable to meet the statutory requirements, because unable to furnish a bond, is not entitled to the privilege. *Hadfield v. Lundin* (Wash.) 1918C-942.

(Annotated)

20. Laws 1915, p. 227 (Rem. Code 1915, § 5562-37 et seq.), requiring of persons, engaged in business of transporting passengers on streets in motor vehicles, a bond running to the state with good and sufficient surety company licensed to do business in the state as surety, is not complied with by a bond from a company authorized to write indemnity insurance, indemnifying such person and by him assigned to the state for benefit of persons injured. *Hadfield v. Lundin* (Wash.) 1918C-942.

(Annotated)

CEMETERIES.

1. Cemetery association.—Right to vote.—Creditors of a cemetery company, under the general laws relating to cemeteries, have no right to vote at an election of trustees. *Bonyng v. Frank* (N. J.) 1918D-211.

2. Disinterment and removal of remains.—A court of equity, notwithstanding the absence of legislation on the subject, has power, in its sound judicial discretion, to authorize the removal of graves or cemeteries in a proper case, after due consideration of all the facts, and with due regard to the rights and feelings of all concerned. *Grinnan v. Fredericksburg Lodge* (Va.) 1918D-729.

(Annotated)

3. A Masonic Lodge in 1784 was given a one-half acre lot in trust for the use of the lodge, and, shortly afterwards by acts, but without a formal dedication, set it aside as a burial place for its deceased members, and received contributions for the erection of a "George Washington Memorial Temple," and in 1912 resolved that the remains of those interred in the proposed site of such temple should, in a reverent and proper manner, be disinterred and removed to another part of the lot, with the right of relatives to take the remains for interment elsewhere. On a bill by parties, alleging that their ancestors had been buried in the cemetery to enjoin such removal, as an injury to their rights and feelings, it appeared that the cemetery had been neglected and had become unsightly, and that the erection of the temple would probably result in beautifying and caring for the burial part of the lot. It is held in view of Code 1904, § 1416a, permitting removal of cemeteries under certain circumstances and conditions, that the proposed removal would not be enjoined. *Grinnan v. Fredericksburg Lodge (Va.)* 1918D-729. (Annotated)

4. Nature of interest in burial lot.—The interest which one may have in a burial lot in a cemetery is not a fee, but is a privilege or license to make interments in the lot exclusively of others, as long as the cemetery remains as such. *Grinnan v. Fredericksburg Lodge (Va.)* 1918D-729. (Annotated)

CERTIFICATES.

Necessity for architect's certificate under building contract, see **CONTRACTS**, 31, 32.

CERTIFIED QUESTION.

See **APPEAL AND ERROR**, 13.

CERTIORARI.

Review of proceedings in juvenile court, see **INFANTS**, 13.

1. Presumption as to findings.—The supreme court, on certiorari to quash a judgment of the court of appeals on the ground of the refusal by the court of appeals to follow the last previous ruling of the supreme court, will presume that the court of appeals, undertaking to state the facts, stated all the facts of record on the question in issue. *State v. Ellison (Mo.)* 1918C-1.

CHALLENGE.

Of voter, see **ELECTIONS**, 10.
To jury, see **JURY**, 2-10.

CHAMPERTY AND MAINTENANCE.

Validity of provision against interest in contract of insurance, see **INTEREST**, 1.

CHARACTER.

Proof of character to impeach witness, see **WITNESSES**, 14, 17.

Proof of good reputation to corroborate witness, see **WITNESSES**, 16.

CHARITIES.

1. Hospital as charity.—A hospital organized and maintained with funds donated, caring for all sick and injured persons brought to it, charging those who are able to pay and treating free of charge those who are not, operated under a board of trustees consisting of the Protestant Episcopal bishop and the rector and church wardens, is a charitable institution. *Bishop Randall Hospital v. Hartley (Wyo.)* 1918E-1172.

2. Validity of gift.—A bequest to trustees "for such public, benevolent or charitable purposes in connection with" a certain parish as the trustees in their discretion shall think proper is void for uncertainty. *Houston v. Burns (Eng.)* 1918C-434. (Annotated)

3. Bequest of income.—Making up deficiency.—Where testator bequeaths the income of certain portion of his property in trust to a charity, and placed a limitation thereon, a deficiency in income of one year cannot be made up out of the excess of another. *Parkhurst v. Ginn (Mass.)* 1918E-982.

4. Liability for negligence of employee.—A charitable institution operating a hospital is not liable for injuries to patients due to negligence of nurses employed in the hospital, in the absence of its own primary negligence in hiring incompetent nurses. *Bishop Randall Hospital v. Hartley (Wyo.)* 1918E-1172. (Annotated)

CHARTER.

See **MUNICIPAL CORPORATIONS**, 1-6, 11.

CHATTEL MORTGAGES.

See **MORTGAGES**.

Assignment of proceeds of building contract as chattel mortgage, see **ASSIGNMENTS**, 8, 9.

Instrument as mortgage or pledge, see **PLEDGE**, 1, 2.

Validity of assignment of corporate stock as collateral security as against trustee in bankruptcy, see **BANKRUPTCY**, 2.

1. Necessity of recording.—A chattel mortgage, even if not recorded, is valid and binding between the parties. *Martin v. Bankers Trust Co. (Ariz.)* 1918E-1240.

2. Mortgage on stock of goods.—A chattel mortgage upon future-acquired personal property or a fluctuating stock of goods is valid as between mortgagor and mortgagee. *Kenney v. Hurlburt* (Ore.) 1918E-737.

(Annotated)

3. Where the lender to a purchaser of a stock of goods made the loan in good faith and took a chattel mortgage on the stock as security, believing that the mortgage was security, and such mortgage was not given for the benefit of the purchaser of the stock of goods, the proceeds of any sales to be paid to the mortgagee or used in purchase of new stock to come under the mortgage and to replace that sold at the inception of the transaction, the mortgage is valid as between the lender and the purchaser. *Kenney v. Hurlburt* (Ore.) 1918E-737. (Annotated)

4. Perfecting lien by taking possession.—Though a chattel mortgage, executed in good faith by the purchaser of a stock of goods to the person who lent him money to enable him to make the purchase is invalid as against the creditors of the purchaser, it being upon a fluctuating stock of goods, the lender's mortgage lien is perfected when he is put in possession of the merchandise by the purchaser, the mortgage operating as an executory agreement which subjected after-acquired goods to the mortgagee's lien on his taking possession before the rights of third persons intervened. *Kenney v. Hurlburt* (Ore.) 1918E-737.

5. Mere existence of claims of creditors of the mortgagor, without attachment or seizure upon execution, is not an intervention of the rights of third persons, preventing subjection of after-acquired goods to the lien of a chattel mortgage on the mortgagee's taking possession before the rights of third persons intervened. *Kenney v. Hurlburt* (Ore.) 1918E-737.

6. Where money was lent to enable the borrower to purchase a stock of goods, and the lender took a chattel mortgage on the fluctuating stock, authorizing him, in case of a default, to take possession of the goods and sell them at private sale without notice to pay the borrower's note, the fact that the lender, when he took possession under the stipulation and was proceeding in good faith to sell the property, was not unmindful of the claims of unsecured creditors and offered and proposed to get all he could out of the property for them, does not lessen nor defeat his security. *Kenney v. Hurlburt* (Ore.) 1918E-737.

7. Accounts assigned as collateral—Valuation and disposal of proceeds.—Where accounts payable to a mortgagor are assigned to the mortgagee as collateral security for the note secured by the mortgage, the accounts will not be given an estimated value in reducing the balance due on the note, but the actual amount realized on the accounts will be added to the proceeds of the sale of the mortgaged property for the satisfaction of the balance due on the note and the costs of foreclosure, the surplus to go to the mort-

gagor. *Kenney v. Hurlburt* (Ore.) 1918E-737.

8. The mortgagee in such a case must account to the receiver of the mortgagor for the balance realized thereon and for the uncollected accounts. *Kenney v. Hurlburt* (Ore.) 1918E-737.

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1. Construction of statute.—Section 40 of the New York Civil Rights Law (McKinney's Consol. Laws, Book 8, p. 37) as amended by Laws 1913, c. 265, as to denial of accommodation in public places on account of race, and section 41 (McKinney's Consol. Laws, Book 8, p. 42) as so amended, imposing a penalty, being both penal and criminal, must be strictly construed, and will not be enforced beyond the clear legislative intent. *Gibbs v. Arras Bros.* (N. Y.) 1918D-1141.

2. Liquor saloon as "place of public accommodation."—Said section 40, as amended, providing that no proprietor of "any place of public accommodation, resort or amuse-

ment" shall deny accommodation to any person on account of race, creed, or color, and defining such place to include any inn, tavern, or hotel which is conducted for the entertainment of guests, or for the accommodation of those seeking health, recreation, or rest, any restaurant, eating house, barber shop, theater and music hall, does not include a liquor saloon. *Gibbs v. Arras Bros.* (N. Y.) 1918D-1141. (Annotated)

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Validity of act regulating closing hours of mercantile establishments, see CONSTITUTIONAL LAW, 6-9.

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Admission in connection with offer of compromise, see ADMISSIONS AND DECLARATIONS, 14, 15.
Settlement of cause of action for conversion, see CONVERSION, 3.

1. Binding effect.—Where, as in this case, at least one of the items in the account sued for is covered by a contract of compromise between the parties, an instruction to the jury that such compromise is binding upon the parties thereto unless impeached for fraud, or because something has been inadvertently omitted therefrom, is properly given. *Parkersburg, etc. Sand Co. v. Smith*, (W. Va.) 1918E-449.

COMPULSORY SERVICE.

See ARMY AND NAVY.

CONDITIONAL SALES.

Liability of purchaser under conditional sale contract for goods destroyed, see **SALES**, 8.

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As defense to proceeding for annulment of marriage, see **MARRIAGE**, 13, 14.

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Applicability of workmen's compensation act to employer who removed plant from state before passage of act, see **MASTER AND SERVANT**, 6.

Law governing payment of benefits by foreign beneficial associations, see **BENEFICIAL ASSOCIATIONS**, 20.

1. **Contract to arbitrate.**—Under the laws of New York, a provision in a foreign contract that disputes between the charterer and the owner of a vessel should be settled by arbitration is unenforceable, because it would be held to affect only the remedy and to be contrary to public policy, as ousting the courts of jurisdiction. *Aktieselsk Abet Korn-og, etc. v. Rederiaktiebolaget, etc.* (U. S.) 1918E-491. (Annotated)

2. **Insurance Contract.**—Where a foreign insurance company licensed to do business in the state of Missouri, issues a life policy to a resident of that state, the contract is a Missouri one. *New York Life Ins. Co. v. Dodge* (U. S.) 1918E-593. (Annotated)

3. A clause in a life policy, issued by a foreign insurer licensed to do business in Missouri, which provides that loans can be obtained by the insured on the sole security of the policy, imposes no obligation on the insurer to make such loans, if the Missouri statute applied and prohibited hypothecation of the reserve as security. *New York Life Ins. Co. v. Dodge* (U. S.) 1918E-593. (Annotated)

4. As a state cannot, under Const. U. S. Amend. 14, forbid a citizen from making contracts outside its limits while he remains within, Rev. St. Mo. 1899, § 7897, providing that no policies of life insurance issued by any company authorized to do business in the state shall after payment of three annual premiums be forfeited by reason of nonpayment, but that the net value of the policy shall be computed, and after deducting from three-fourths of such value any notes or

other evidence of indebtedness given on account of past premium payments, the balance shall be taken as a net single premium for temporary insurance, does not apply to a loan contract entered into between a policyholder, a resident of Missouri, and a New York insurer authorized to do business in Missouri, and which in that state wrote the policy involved, where it was expressly agreed between the parties in the loan agreement, the application for which was transmitted to the insurer's New York office, that the laws of New York, under which the hypothecation of the reserve was valid, should govern. *New York Life Ins. Co. v. Dodge* (U. S.) 1918E-593. (Annotated)

5. **Rules of pleading and evidence.**—In the absence of Congressional enactment and subject to section 3999, St. 1893 (section 4772, Rev. Laws 1910) the general rules of pleading and evidence obtain in ascertaining in one state what faith and credit is given a judgment in the courts of another state in which such judgment was rendered. *St. Louis, etc. R. Co. v. Crews* (Okla.) 1918C-823.

CONFUSION OF GOODS.

1. **Rights of lien claimant.**—Rem. & Bal. Code, § 1188, provides that, during the year in which farm labor is performed, the laborer shall have a lien upon all crops raised on the land, superior to all other liens, including a prior chattel mortgage. Section 1190 requires the claim of lien to be filed with the county auditor within forty days after the close of the work; section 1190a gives all lienholders for farm labor the rights secured to lienors on logs as specified in section 1181, providing that any person eluding or rendering it difficult, uncertain, or impossible to identify any sawlogs upon which there is a lien, without the express consent of the lienholder, shall be liable for damages to the amount secured by the lien, and that on a showing to the court in the action to enforce the lien the court shall enter a personal judgment against such person if a party to the action, and that all the damages may be recovered by a civil action against such person. Plaintiff performed farm labor in 1912-1913, and in 1913 a lien therefor was adjudicated in his favor, and the grower had it put in a public grain warehouse and commingled with other wheat and negotiable warehouse receipts issued to the defendant, mortgagee, who sold the wheat and delivered the receipts to the purchaser. It is held that as its identification as the wheat from the land on which plaintiff had labored was made difficult, uncertain, or impossible, he might recover damages of the defendant. *Hubbard v. Johnson* (Wash.) 1918C-84.

CONGESTION OF TRAFFIC.

As affecting duty of carrier to transport goods, see **CARRIERS OF GOODS**, 2.

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1 Criminal conspiracy—Proof.—A conspiracy may be inferred from circumstances. *State v. Hyde (Ore.)* 1918E-688.

2 Civil liability—Burden of proof.—In an action for conspiracy to injure plaintiff's business, where plaintiff, by amendment, charged a defendant with a separate and distinct tort done by him as part of the conspiracy, the burden of proof was on plaintiff to prove such separate tort. *McClintock v. McClure (Ky.)* 1918E-96.

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Torrens act, see RECORDING ACTS, 2-5.

1. Nature and Operation of Constitution.

1. Statutes may be nullified, in so far as future operation is concerned, by the constitution as well as by statute, as the constitution is the direct, positive, and limiting voice of the people, and may establish a policy, fix a limit to legislation on a given subject, or prohibit specified acts as being performed by public servants. *Wren v. Dixon* (Nev.) 1918D-1064.

2. Effect on rights previously vested.—Where the rights of a city under a claim of lien had become fixed at the time the provisions of the constitution became effective and in force, its rights would not be affected because the law, under which its right to the lien accrued, might conflict with the constitution, as such rights were preserved by section 4, art. 22, of the constitution. *Roswell v. Bateman* (N. M.): 1918D-426.

2. Police Power.

a. In General.

3. It is fundamentally true that whatever may be enjoined by a court of equity may by legislation be declared *malum prohibitum*. *Hall v. Johnson* (Ore.) 1918E-49.

4. It is not the function of the Federal Supreme Court, under the authority of the fourteenth amendment, to supervise state legislation in the exercise of the police power beyond protecting against exertions of such authority in the enactment and enforcement of laws of an arbitrary character, having no reasonable relation to the execution of lawful

purposes. *Jones v. Portland* (U. S.) 1918E-660.

5. Congress has the power to regulate and restrain the conduct and contracts of all persons for the common good, the possession and enjoyment of liberty and property being subject to such reasonable conditions as may be essential to the safety, health, peace, good order, and morals of the community. *Moyers v. Memphis* (Tenn.) 1918C-854.

b. Regulation of Business.

6. Closing hours.—Laws 1915, c. 23, entitled "An act to regulate the working hours of all employees of mercantile establishments," providing by section 1 that all mercantile and commercial houses in cities of 10,000 population and over should close at 6 P. M., on every business day in the year except for the six business days preceding December 25th, by section 2, exempting all houses dealing mainly in provisions of a perishable nature which are regarded as public necessities, by section 3, exempting drug stores which are regarded as public necessities, violates the constitutional provision that the subject of an act shall be clearly expressed in its title, since instead of regulating the working hours of employees, the body of the act fixed a closing hour for mercantile and commercial houses, extending both to those having employees and those having none. *Saville v. Corless* (Utah) 1918D-196. (Annotated)

7. Such act is invalid as an exercise of the police power, since the men's furnishing and jewelry business conducted by one of the petitioners without help, and the retail cigar business of the other petitioner, does not affect the health or safety of those engaged in it, and since the act fixes a closing hour and is not directed to enterprises affecting the health, morals, safety, or general welfare. *Saville v. Corless* (Utah) 1918D-198. (Annotated)

8. Such act is objectionable as being special legislation, since it only applies to cities of 10,000 or more, and since it exempts drug stores and commercial houses dealing mainly in food stuffs and provisions of a perishable nature. *Saville v. Corless* (Utah) 1918D-198. (Annotated)

9. Such act violates the constitutional right to enjoy, acquire, and possess property, the most valuable of which is that of the right to sell. *Saville v. Corless* (Utah) 1918D-198. (Annotated)

3. Due Process of Law.

10. The due process of law clauses of the Federal Constitution, while designed to preserve life, liberty, and property inviolate against arbitrary power, do not interfere with the police power of the different states. *Moyers v. Memphis* (Tenn.) 1918C-854.

4. Privileges and Immunities.

11. Attaching conditions to privileges granted.—Congress has the power to determine the conditions upon which the govern-

ment will consent to be sued, or upon which it will grant pensions or other bounties; or prescribe conditions upon which attorneys will be allowed to represent claimants, or litigants before any of the courts of the government, within certain reasonable limitations, if done by general laws applicable to all alike, and in advance of the services rendered in such courts. *Moyers v. Memphis* (Tenn.) 1918C-854.

12. Preservation of rights of accused.—It is the duty of the supreme court to give effect to all the constitutional and other rights of a defendant in a criminal case, and also to sustain all legislative enactments, unless it is satisfied beyond a reasonable doubt that they violate the fundamental law. *People v. Brady* (Ill.) 1918C-540.

5. Personal and Religious Liberty.

13. Right to follow occupation.—The right of a citizen to pursue any calling, business, or profession he may choose is a property right to be guarded by equity as zealously as any other form of property. *New Method Laundry Co. v. MacCann* (Cal.) 1918C-1022.

14. Liberty of contract.—The liberty of contract is one of the inalienable rights of a citizen, embracing, as it does, the right to enter a lawful calling and to acquire and dispose of property, so that a general prohibition against entering into contracts with respect to property is unconstitutional and void. *Moyers v. Memphis* (Tenn.) 1918C-854.

15. Liberty of contract and right of property are not absolute and universal, in spite of the fifth and fourteenth amendments to the United States Constitution, and it is within the power of the government to restrain some individuals from all contracts, as well as all individuals from some contracts. *Moyers v. Memphis* (Tenn.) 1918C-854.

16. Right to patronize tradesman.—The constitutional guaranties of liberty include the privilege of every citizen to freely select those tradesmen whom he may desire to patronize, and equity cannot invade or take away this right, either directly or indirectly, without due process of law. *New Method Laundry Co. v. MacCann* (Cal.) 1918C-1022.

6. General and Special Laws.

17. Exceptions.—Exceptions founded on reason do not render a general statute or ordinance unconstitutional as special legislation. *State v. Scullin-Gallagher Iron, etc. Co.* (Mo.) 1918E-620.

7. Delegation of Legislative Power.

18. Statute effective on ratification by voters.—The submission by the legislature of a special and local statute proposing a new form of government for an existing municipal corporation to a vote of the electors of the municipality for adoption or rejection is not a delegation of the authority or functions of the legislature. *Gretna v. Bailey* (La.) 1918E-566. (Annotated)

8. Self-executing Provisions.

19. In determining when a constitutional provision is self-executing, there is a distinction between a declarative limitation of legislative power on a given subject, within which legislation may or should be enacted, and positive constitutional inhibition which no legislative act can relieve or modify; the former might require future legislation; the latter must, from its nature, be self-executing. *Wren v. Dixon* (Nev.) 1918D-1064. (Annotated)

20. Prohibitory provisions in a constitution are usually self-executing to the extent that anything done in violation of them is void, and no legislation is required to execute such provision; but they are not self-executing when they merely indicate principles without laying down rules by which they may be given the force of law. *Wren v. Dixon* (Nev.) 1918D-1064. (Annotated)

21. Taxation of patented mines.—Const. art. 10, § 1, as amended in November, 1902 (see St. 1901, p. 136), declared that the legislature should provide a uniform and equal rate of assessment and taxation to secure a just valuation of real and personal property, mining claims, etc., and that the acreage of patented claims should be assessed at the valuation of \$10 per acre. St. 1905, c. 58, provided for the assessment of patented mines at such valuation. Article 10, § 1, as amended in 1906 (see St. 1907, p. 501), provided that patented mining claims should be assessed at not less than \$500, except when \$100 in labor has been actually performed on such mine during the year, in addition to the tax on the net proceeds, and no legislation was passed pursuant to such provision until 1913. It is held that the constitutional amendment of 1906 was self-executing at least to the provision for taxation of patented mines, and absolutely nullified the statute of 1905, so that an assessment thereunder in 1909 was invalid. *Wren v. Dixon* (Nev.) 1918D-1064. (Annotated)

9. General Principles Governing Determination as to Constitutionality of Statutes.

a. In General.

22. Natural effect.—A statute must be judged by its natural and reasonable effect. *Hammer v. Dagenhart* (U. S.) 1918E-724.

23. Necessity of conflict with constitution.—A statute cannot be judicially declared beyond the power of the legislature to enact, unless some provision of the constitution which is in conflict with it can be specifically pointed to. *Cleveland v. Watertown* (N. Y.) 1918E-574.

24. Federal review of state legislation.—While the ultimate authority to determine the validity of state legislation under the fourteenth amendment rests in the Federal Supreme Court, local conditions are of such varying character that what is or is not a public use in a particular state, for which money may be raised by taxation, is a matter respecting which local authorities have pe-

cular facilities for securing accurate information, and a judgment of the highest court of the state as to what should be deemed a public use is entitled to the highest respect. *Jones v. Portland* (U. S.) 1918E-660.

25. In determining the constitutionality of state statutes enacted at different dates under which license taxes were assessed, the Federal Supreme Court should follow the decisions of the state court and construe the statutes as being part of a single scheme. *International Paper Co. v. Commonwealth of Massachusetts* (U. S.) 1918C-617.

b. Who May Raise Constitutional Question.

25½. **Persons entitled to attack statute.**—This court will not pass upon the constitutionality of an act of the legislature nor of any of its provisions until there is presented a proper case in which it is made to appear that the person complaining is entitled to the benefits of the act or about to be subjected to some of its burdens or penalties. *Insurance Co. of North America v. Welch* (Okla.) 1918E-471.

26. **Ministerial officer.**—It is the imperative duty of a ministerial county officer to obey the order of a tribunal vested with authority to direct his action, and he cannot question or decide on its validity or attack the validity of the statute on which it proceeds. *People v. Pitcher* (Colo.) 1918D-1185. (Annotated)

c. Construction in Favor of Validity.

27. It is settled law that the charter of a municipality or a state statute will not be held to violate the constitution if any other rational interpretation can be given it, this being particularly true with respect to the states where the legislature has plenary power. *Pitman v. Drabelle* (Mo.) 1918D-601.

d. Presumption in Favor of Validity.

28. A statute is presumptively valid, and its unconstitutionality must appear beyond reasonable doubt before it will be set aside. *State v. Scullin-Gallagher Iron, etc. Co.* (Mo.) 1918E-620.

29. If there is a doubt as to the constitutionality of a law, it must be solved in favor of its validity; and it is only where a law is manifestly in violation of some provision of the constitution that a court may declare it void. *Ex parte Mode* (Tex.) 1918E-845.

30. No act of the legislature will be pronounced unlawful unless its nullity is made manifest beyond a reasonable doubt; doubt alone being insufficient to overturn an act of the legislature. *State v. State* (Mont.) 1918D-1101.

e. Wisdom of Statute.

31. Courts have no right to strike down laws enacted by the legislature, no matter how unwise they may deem them, unless they can find an inhibition in the consti-

tution. *Ex parte Mode* (Tex.) 1918E-845.

32. When the legislature acts within its constitutional authority, in the exercise of the police power of the state, the expediency of its action is not a question for the courts. *Hadfield v. Lundin* (Wash.) 1918C-942.

10. Construction of Constitutions.

33. The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it, which intent is to be found in the instrument itself, as it is to be presumed that language has been employed with sufficient precision to convey it, and, unless it appears that the presumption does not hold in the particular case, nothing will remain but to enforce it. *Wren v. Dixon* (Nev.) 1918D-1064.

34. **Extraneous aids.**—In seeking the intent of the people in adopting a constitutional limitation, if concealed in ambiguous phraseology, courts may properly resort to other relevant provisions of the instrument, the history of the times, laws then existing, the mischiefs existing, and the appropriate remedies. *Kelso v. Cook* (Ind.) 1918E-68.

35. In construing ambiguous constitutional provisions, the legislative interpretation, when acquiesced in for a long period of time, is entitled to great weight with the court. *Kelso v. Cook* (Ind.) 1918E-68.

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Waiving tort and suing on contract, see TORTS, 1, 2.

1. Elements.

1. Effect of intoxication of party.—The fact that a party to a contract is intoxicated at the time of entering into it renders the contract voidable only and it is ratified by a failure to disaffirm it within a reasonable time. *Bawlf Grain Co. v. Ross* (Can.) 1918E-319. (Annotated)

2. Consideration—Marriage of third persons.—Four days before the marriage of defendant's daughter to G., defendant and G. executed a contract, reciting the marriage engagement, and providing that defendant, in consideration of all that was therein set forth, agreed to pay his daughter annually a specified sum, the first payment to be made on a specified date, which was the date of the marriage. On the date of the marriage, the first payment was made to the daughter. It is held that the agreement was not without consideration on the theory that the only consideration was G.'s performance of his legal obligation to the daughter, as G. and the daughter jointly could have rescinded or modified the contract, and the promise was intended to affect the conduct of both and not of G. only; it being a legitimate inference from the relations of the parties and the other attendant circumstances that she, as well as G., knew of the promise at the time of the marriage, and that both acted upon the faith of it. *De Cicco v. Schweizer* (N. Y.) 1918C-816. (Annotated)

3. While the prospective marriage is not a consideration for the promise unless the parties treat it as such, the defendant's promise is an agreement in consideration of the marriage and not a mere offer of a gift, or at least the inference cannot be drawn as one of law that it is not a promise in consideration of marriage. *De Cicco v. Schweizer* (N. Y.) 1918C-816. (Annotated)

4. The promise having been made while G. and the daughter were free to retract or to delay the marriage, and as neither retracted nor delayed, it is a legitimate inference that they were induced by the promise to put the thought of rescission or delay aside, and, to support the contract, it is not necessary to show that the daughter was ready to withdraw. *De Cicco v. Schweizer* (N. Y.) 1918C-816. (Annotated)

5. Since under such a contract G. does not promise anything by the contract, and the consideration is not a promise, but the act of marrying, the contract is unilateral, and until the marriage occurs defendant is not bound, though G. remains willing to marry. *De Cicco v. Schweizer* (N. Y.) 1918C-816. (Annotated)

6. As the promise though made to G., is intended for the benefit of the daughter, she has a right to adopt and enforce it when it comes to her knowledge, and in doing so she

makes herself a party to the contract. *De Cicco v. Schweizer* (N. Y.) 1918C-816.
(Annotated)

2. Construction and Interpretation.

7. Construction together of separate instruments.—Where a contract is executed which refers to and makes the conditions of another instrument a part of it, the two will be construed together as the agreement of the parties. *Aetna L. Ins. Co. v. Bradford* (Okla.) 1918C-373.

8 Intent of parties.—The cardinal rule of interpretation is the discovery of the intent and meaning of the parties from the language used, and this applies to sealed as well as to unsealed writings. *Devy v. Connecticut Co. (Conn.)* 1918D-270.

9. If the intent and purpose of parties to a contract is reasonably within the scope of the language used, it must be taken to be a part of the agreement as if plainly expressed. *Manson v. Curtis* (N. Y.) 1918E-247.

10. The ascertainment of the substantial intent of the parties, as expressed, is the fundamental rule in the interpretation of all contracts, such intent to be determined in view of the agreement as a whole, the matters with which it deals, and the circumstances under which it was made. *Manson v. Curtis* (N. Y.) 1918E-247.

11. Agreement for correspondence school course.—Under the defendant's contract with plaintiff university for course of instruction by correspondence, "including text and service as outlined, for which I agree to pay \$66 . . . express charges on text to be prepaid by the university and included in my account," the defendant must pay, besides the \$66, the express charges. *La Salle Extension University v. Ogburn* (N. C.) 1918C-887.

3. Validity.

a. In General.

12. An agreement capable of a construction which will make it valid will not be adjudged illegal. *Manson v. Curtis* (N. Y.) 1918E-247.

13. Partial invalidity.—Where the main purpose of a single and indivisible contract between corporate stockholders was illegal, being to secure a passive directorate, subject to control of one stockholder, the whole contract, including both its main and secondary stipulations, is void and invalid. *Manson v. Curtis* (N. Y.) 1918E-247.

14. Good faith in making illegal contract.—The good faith of corporate stockholders in making an agreement, contemplating a passive directorate to be controlled by one, does not purge the agreement of its illegality. *Manson v. Curtis* (N. Y.) 1918E-247.

b. Contract Contemplating Practice of Law by Corporation.

15. Where a defense set up in a corporation's action on a contract was that the contract was void because plaintiff by it held

itself out to be "lawfully qualified to practice law," and not because plaintiff by it undertook to practice law, plaintiff cannot avoid this defense by showing that it was not illegal for it to practice law, and that its charter authorized it to practice law "so far as is lawful." *Creditors Nat. Clearing House v. Bannwart* (Mass.) 1918C-130.

c. Contracts for the Suppression of Bidding.

16. Agreement to purchase jointly at auction.—An agreement between the plaintiffs and a corporation to buy jointly the fixtures and stock of an insolvent at public sale is not invalid where made for the legitimate purpose of combining the parties' resources and not to chill or suppress bidding. *Stack v. Roth Bros. Co. (Wis.)* 1918C-741.

17. Such agreement is not unsupported by consideration, as the promises of the parties each to furnish half of the purchase price are performable, concurrent, and mutually binding at the same time. *Stack v. Roth Bros. Co. (Wis.)* 1918C-742.

d. Relief of Parties.

18. Contracts having a tendency to injure public service are in a different class from other gambling contracts regarding any relief to be afforded thereunder by the courts. *Martin v. Francis* (Ky.) 1918E-289.

19. Recovery back of deposit.—Where a candidate deposits money with a third party to secure performance of an agreement with his opponent to appoint him deputy, and divide fees upon the latter's withdrawal of his candidacy, just previous to election, and the stakeholder loans the money to another party after the agreement has been acted upon, the depositor cannot recover the money deposited. *Martin v. Francis* (Ky.) 1918E-289.

20. Exception to rule.—The plaintiff purchased from a patent holder of a crude oil burner an agency contract to sell "family rights" and "agency contracts." The agency contract was a characteristic scheme in the nature of "an endless chain," and void as against public policy. To secure the purchase price of the agency contract, the plaintiff gave the patent holder a deed to some property, the deed being intended to operate as a mortgage. An attaching and judgment creditor of the patentee sought to subject the property to the satisfaction of his claim and judgment against the patent holder. Held, that the fact that the plaintiff, in the original contract, was in equal wrong with the patent holder will not prevent a court of equity from granting plaintiff relief when its refusal to do so would in effect give countenance, force and effect to the original illegal contract between the plaintiff and the patentee and carry its consequences even further than the contracting parties intended. *Saylor v. Crooker* (Kan.) 1918D-473.

(Annotated)

4. Performance or Breach.

21. Partial rescission.—One cannot repudiate part of his entire contract and retain the

benefit of another part. *La Salle Extension University v. Ogburn* (N. C.) 1918C-887.

22. Overcharge as ground for repudiation.—Any overcharge in statement of account sent defendant does not authorize abandonment or repudiation by him of his contract with plaintiff for a course of instruction by correspondence, and refusal to pay anything; but he should pay what is due, and decline to pay the overcharge. *La Salle Extension University v. Ogburn* (N. C.) 1918C-887.

23. Remedies on breach.—Defendant, by repudiating his contract for a course of instruction by correspondence payable in instalments, and refusing to pay the first instalment, cannot prevent plaintiff performing and recovering the full amount agreed on; especially where the contract provides that, if an instalment is not paid in a certain time after due, the unpaid balance shall become immediately due. *La Salle Extension University v. Ogburn* (N. C.) 1918C-887. (Annotated)

5. Building or Working Contracts.

a. Construction of Provisions.

24. Severable contract.—A contract to drive certain piling, at a stipulated price per pile, to make certain excavation for a cofferdam, and to afterwards remove the embankment, at a stipulated price per cubic yard, and to provide a pump of sufficient capacity and efficiency to perform the contract, at a stipulated price per day, etc., is not a contract of entirety. *Parkersburg, etc. Sand Co v. Smith* (W. Va.) 1918E-449.

b. Performance or Breach.

25. Breach.—Where plaintiffs contract with defendant to buy jointly an insolvent's fixtures and stock at public sale, and, after making financial arrangements, which are necessary for them to care for their half of the price, are advised by defendant at the last moment, when they are not able to take care of themselves, that defendant will not perform its part of the agreement and furnish its half of the price, plaintiffs sustain damage. *Stack v. Roth Bros. Co.* (Wis.) 1918C-741.

26. Effect of renunciation by one party.—An absolute renunciation of a contract by one of the parties thereto constitutes a breach thereof, and also relieves the other from performance of his promise or covenant. *Lewis v. West Virginia Pulp, etc. Co.* (W. Va.) 1918D-754.

27. Arbitration—Effect.—The award of the arbitrators, Horstman and Burgess, made pending the execution of plaintiff's contracts, requiring it to remove the cofferdam embankment to the satisfaction of the government of the United States, omitting the other words of the original contract, requiring that work to be done to the satisfaction of defendant also, and the acceptance thereof by the parties, properly construed, did not constitute a modification of that provision of the original contract. *Parkers-*

burg, etc. Sand Co. v. Smith (W. Va.) 1918E-449.

28. Destruction of building.—Where a building is burned before completed, unless the building contract is mutually abandoned, the contractor must, in the absence of provision to the contrary, stand the loss and rebuild to be entitled to any payment; such destruction not preventing performance so as to excuse it under Civ. Code, § 1511. *Ahlgren v. Walsh* (Cal.) 1918E-751.

29. Within a building contract apportioning between owner and contractor the loss in case of destruction by fire or earthquake of the building before completion, varying as the destruction is complete or partial, there is a complete destruction where on one day an earthquake does some injury to it, and on the next day fire started by the earthquake reaches the building and entirely destroys it. *Ahlgren v. Walsh* (Cal.) 1918E-751.

30. Under the provision of a building contract that, if the work before completion be wholly destroyed by fire, the loss shall be sustained by the owner to the extent that he has paid instalments or that may be due, the contractor is entitled to payment of an instalment due at the time of the fire, before reconstructing the building up to the point where such instalment became due. *Ahlgren v. Walsh* (Cal.) 1918E-751.

31. Architect's certificate.—Under the owner's agreement to pay the contractor an instalment when a certain work on the building is finished, provided that, when the instalment becomes due, a certificate shall be obtained from the architect, such certificate, in the absence of contrary provision, is necessary for the instalment to be payable and right of action thereon to accrue. *Ahlgren v. Walsh* (Cal.) 1918E-751.

32. Within the provision of a building contract that, if the work before completion be wholly destroyed by fire, then the loss occasioned thereby shall be sustained by the owner to the extent that he has paid instalments thereon, or that may be due under the fifth clause of the contract, and the contractor shall sustain the loss for the uncompleted portion of the work on which he may be engaged at the time of the loss, and for which no payment is yet due under said fifth clause, the contractor having before the fire finished a portion of the work, on the finishing of which the owner by the fifth clause agreed to pay the contractor an instalment, provided that, when an instalment shall become due, a certificate shall be obtained from the architect stating that the instalment is due, such instalment is "due" at the time of the fire, though a certificate had not been obtained from the architect; "due" being used in the sense of an instalment earned, unpaid, and owing though a certificate had not been obtained to make it payable under the fifth clause. *Ahlgren v. Walsh* (Cal.) 1918E-751. (Annotated)

c. Bond of Contractor.

33. Liability of surety.—Where contrac-

tors agree to build a road and to pay "for all labor and material and all other obligations or liabilities incurred in the doing of the said work or performance of any of the things necessary hereunder," and a surety company, for a valuable consideration, guarantees the performance of the contract, and where the contractors fail to pay the necessary and pertinent bills incurred by them in such undertaking, the surety company is liable thereon. *Shannon v. Abrams* (Kan.) 1918E-502.

34. Claims covered.—In a road-building contract which named the quarry where the materials for the road were to be obtained, the contractors failed to pay the necessary and pertinent accounts for dynamite, for coal consumed in the engine which operated the rock crusher, for lumber, for the rent of the quarry, and for the rent of tools. Held, that the surety company was liable for the payment of these accounts under its surety obligation. *Shannon v. Abrams* (Kan.) 1918E-502.

d. Actions.

35. Recovery on quantum meruit.—Where a party to a contract fails to furnish a pumping outfit of the capacity and efficiency called for by his contract, he is not entitled to recover the full price per diem stipulated therefor in the contract, but only such sum as the same is reasonably worth to the other party to the contract. *Parkersburg, etc. Sand Co. v. Smith* (W. Va.) 1918E-449.

36. Pleading.—Mutual abandonment of a building contract, as regards reconstruction of the building, after its destruction while incomplete, to be the foundation of a recovery by the contractor of an instalment due before the destruction, must be pleaded; if not being enough that it appears in the evidence. *Ahlgren v. Walsh* (Cal.) 1918E-751.

CONTRIBUTION.

Bar of right by limitations, see **LIMITATION OF ACTIONS**, 4.

Subrogation as against coparties, see **SUBROGATION**, 4.

CONTRIBUTORY NEGLIGENCE.

See **NEGLIGENCE**, 4, 5, 10.

Of boy injured by contact with broken electric wire, see **ELECTRICITY**, 17.

Of guest in automobile, see **AUTOMOBILES**, 22, 23.

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Of person struck by automobile after alighting from street car, see **AUTOMOBILES**, 3, 4.

CONVERSATION.

Admissibility of entire conversation where part produced in evidence, see **ADMISSIONS AND DECLARATIONS**, 21, 22.

CONVERSION.

Unauthorized use by bailee as conversion, see **BAILMENT**, 2.

1. Effect of return of property.—In an action of trover for the conversion of an automobile, evidence of the return of the car may be shown in mitigation of damages, but not in bar of the action. *Baxter v. Woodward* (Mich.) 1918C-946.

2. Necessity of demand.—Where there is an overt act of conversion, no demand by the owner is necessary before bringing action. *Baxter v. Woodward* (Mich.) 1918C-946.

3. Evidence of compromise negotiations is held to be insufficient to prove a settlement of the cause of action for conversion of an automobile. *Baxter v. Woodward* (Mich.) 1918C-946.

4. Question for jury.—In an action of trover for the conversion of an automobile, whether there was a settlement or waiver of the tort is a question of fact. *Baxter v. Woodward* (Mich.) 1918C-946.

5. Measure of damages.—The measure of damages for the conversion of an automobile is the value of the car at the time converted with interest thereon. *Baxter v. Woodward* (Mich.) 1918C-946.

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CORPORATIONS.

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Assignment of statutory liability of corporate officer, see **ASSIGNMENTS, 2.**

Delay in enforcing subscription to corporate stock as laches, see **LACHES, 2, 3.**

Dissolution of corporation as abating pending suit against it, see **ACTIONS AND PROCEEDINGS, 1.**

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Use of money of corporation for election expenses, see **ELECTIONS, 19.**

What constitutes practice of law by corporation, see **ATTORNEYS, 1.**

1. Matters Relating to Corporate Existence.

1. Prerequisites to existence.—The statutory requirements provided by section 8632 et seq., General Code, for the creation of a corporation are mandatory and must be complied with before the corporation can be in existence. *Parkside Cemetery Assoc. v. Cleveland, etc. Traction Co. (Ohio) 1918C-1051.*

2. Change of name—Effect on prior guaranty.—Where the name of a corporation, the principal in a continuing guaranty contract, is changed, but the same president continues in charge, and guarantors continue as stockholders, directors, and officers, and the stockholders' vote for the change was unanimous, the change does not relieve the guarantors from their liability. *Scovill Mfg. Co. v. Cassidy (Ill.) 1918E-602.*

3. Estoppel to deny corporate existence.—Where parties contracted and dealt with each other as corporations, although the name of plaintiff's assignor had not been changed, as assumed, each is estopped to deny the corporate capacity of the other, and defendant's contention that the contract was not assignable, because it relied on the skill of one who signed as president of plaintiff's

assignor, cannot be sustained. *Northwest Auto Co. v. Harmon (U. S.) 1918E-461.*

4. A dissolved corporation which takes an appeal from a decree against it and gives bond for its successful prosecution is not in a position to assert that it is nonexistent and incapable of maintaining and defending pending suits. *Pease v. Rathbun-Jones Engineering Co. (U. S.) 1918C-1147.*

5. Dissolution at instance of minority stockholder.—It is the general rule that courts are without authority to dissolve a corporation at the suit of a minority stockholder unless such authority has been conferred by statute. Different courts recognize various exceptions to this rule; but the facts do not bring this case within such exceptions and do not justify the dissolution of the corporation. *Thwing v. McDonald (Minn.) 1918E-420.* (Annotated)

2. Duties and Liabilities.

6. Torts of Agents.—A corporation is liable for the torts of its agents, within the scope of their employment, and in furtherance of the corporate business; and this includes libel. *Morse v. Modern Woodmen of America (Wis.) 1918D-480.* (Annotated)

3. Officers and Agents.

a. Liability.

(1) To Third Persons.

7. Effect of change of officers.—Under Acts 1909, p. 643, requiring corporation officers to make statements to the county clerk of financial conditions of the corporation and making them civilly and criminally liable for debts on failure to do so, the duty imposed is official and ceases when the individual ceases to be an officer, and the civil liability of such officers includes only debts contracted while they are in office. *Breitzke v. Bank of Grand Prairie (Ark.) 1918D-792.*

8. Under such statute, new officers must acquaint themselves with corporation affairs, and, if the required report has not been made, must make it within a reasonable time, and if they do not the civil and criminal liability attaches to them, and the outgoing officers continue to be liable only for debts of their administration, and not for those contracted after their term. *Breitzke v. Bank of Grand Prairie (Ark.) 1918D-792.* (Annotated)

9. Where newly elected officers of a corporation failed for one year to file the report required by Acts 1909, p. 643, which makes them liable for the corporation debts and criminally liable for failure to report within a reasonable time, they cannot escape liability on the ground that the debt was that contracted under former officers, where it was represented by an overdraft which was frequently during their terms reduced to practically nothing and later increased. *Breitzke v. Bank of Grand Prairie (Ark.) 1918D-792.* (Annotated)

10. Estoppel to enforce liability.—Although corporation officers on giving their

note for a corporation debt secured the promise of the payee that it would not hold them personally liable thereon, the payee is not estopped to claim the statutory liability imposed by Acts 1909, p. 643, for failure to make required financial reports. *Breitzke v. Bank of Grand Prairie* (Ark.) 1918D-792.

11. Evidence.—In an action to enforce the liability of corporate officers for debts incurred by the corporation with their consent, and with knowledge that less than half the capital stock had been subscribed, under the provision thereof of St. 1913, § 1774n, the evidence is held to be sufficient to support a finding that half of the capital stock remained so unsubscribed. *Weston v. Dahl* (Wis.) 1918C-922.

12. In such action it was no objection to the introduction in evidence of a copy certified by the secretary of state of the amendment of the articles of incorporation increasing the capital stock, that the certificate of the register of deeds attached thereto was not properly identified, since such register's certificate was part of the record of the secretary of state under the provision of St. 1913, § 1774n, requiring the filing of such register's certificate with the secretary of state. *Weston v. Dahl* (Wis.) 1918C-922.

13. In determining in such action the amount of capital stock actually subscribed, the court properly excluded oral promises to take stock, since they were not subscriptions within the meaning of the statute. *Weston v. Dahl* (Wis.) 1918C-922.

14. Such oral promises are further inadmissible for such purpose, since being for more than \$50 worth of stock they are unenforceable under St. 1913, § 2308, regulating contracts for the sale of goods and things in action. *Weston v. Dahl* (Wis.) 1918C-922.

(2) Equitable Relief to Stockholders.

15. Where the control of a corporation is involved, the remedy at law for damages for the improper sale of stock is inadequate, and where fraud on the part of those managing the company as against the rights of the stockholders is averred, a court of equity has jurisdiction to inquire into the transaction, and make such decree as the circumstances may warrant. *Glenn v. Kittanning Brewing Co.* (Pa.) 1918D-770.

16. Conditions precedent.—A stockholder cannot generally proceed as an individual to redress a wrong done to the corporation without a formal demand upon and a refusal by the corporation to bring proper action, but stockholders are not required to do a vain thing, and where the wrongdoers are the majority of the board of directors it is not reasonable to suppose that a demand upon them would be effective, and stockholders may institute proceedings in their own name without first demanding action by the corporation's officers. *Glenn v. Kittanning Brewing Co.* (Pa.) 1918D-770.

17. Evidence.—On a bill in equity by a stockholder of a brewing company in behalf of himself and others to enjoin a director from voting or transferring certain stock, the

evidence is held to sustain a finding that the issue of stock had been made to gain control of the corporation. *Glenn v. Kittanning Brewing Co.* (Pa.) 1918D-770.

b. Duties, Powers and Liabilities of Directors.

18. By Gen. Corp. Law, § 34 (McKinney's Consol. Laws, book 22, p. 174), the affairs of every corporation shall be managed by its board of directors, subject, by section 11, subd. 5 (McKinney's Consol. Laws, book 22, p. 76), and Stock Corp. Laws, § 30 (McKinney's Consol. Laws, book 58, p. 113), to the valid by-laws adopted by the stockholders. *Manson v. Curtis* (N. Y.) 1918E-247.

19. Delegation of powers.—The directors of a corporation convened as a board are the primary possessors of all the powers conferred by the charter, and may delegate to agents of their own appointment the performance of any acts which they themselves can perform. *Manson v. Curtis* (N. Y.) 1918E-247.

20. Agreement to give control over directors.—Corporations being the creatures of the state, bound to comply with its exactions and regulations, an agreement between two corporate stockholders, the fundamental and dominant purpose of which is to provide a passive president of the board of directors and passive directors, subservient to the will of one of the stockholders in the management of the corporation, is illegal and void, and its violation is not a basis for a cause of action. *Manson v. Curtis* (N. Y.) 1918E-247.

(Annotated.)

21. Fiduciary relation to stockholders.—The directors of a corporation stand in the position of trustees for the stockholders, and while stock owned by director is his individual property, which he may deal with as he sees fit, yet when he acts officially he acts as representatives of others, and cannot take an advantage of his position for his personal profit to the detriment of the stockholders. *Glenn v. Kittanning Brewing Co.* (Pa.) 1918D-770.

(Annotated.)

22. As to new issue of stock.—The directors of a corporation must give its stockholders notice of a new issue for stock and an opportunity to subscribe for stock in proportion to their present holdings, although such issue may be long after the corporation's business was begun, and if they fail to give such notice and purchase the stock themselves in order to gain control of the corporation, the issue may be set aside at the instance of a stockholder. *Glenn v. Kittanning Brewing Co.* (Pa.) 1918D-770.

(Annotated.)

4. Stock and Stockholders.

a. Subscription to Stock.

23. Validity of agreement to repurchase.—A contract whereby the seller of corporate stock agreed to repurchase it at any time upon demand, should the buyer become dissatisfied, was legal and binding, violating no statute, and not being against public policy, and

one which the courts cannot unmake merely because it may have been unwisely made. *Paulson v. Weeks (Ore.)* 1918D-741.

(Annotated)

24. Construction of contract to repurchase.—A contract whereby the seller of corporate stock agrees to repurchase on demand, if the buyer is dissatisfied, is not a conditional contract for the sale or return of the stock, but embraces a completed sale, with an option in the buyer to rescind. *Paulson v. Weeks (Ore.)* 1918D-741.

(Annotated)

25. A contract for the sale of stock of a mining company, giving the buyer the option to rescind if he becomes dissatisfied with his purchase "at any time thereafter," sets a reasonable time, and does not give unlimited time, though primarily "any" implies unlimited choice as to the particular unit, number or quantity, and generally signifies an indeterminate unit or number of units out of many or all, as "any time," employed in such agreements, means reasonable time. *Paulson v. Weeks (Ore.)* 1918D-741.

(Annotated)

26. Under such contract if the buyer becomes dissatisfied, he has the right to rescind, when he becomes honestly and in good faith dissatisfied. *Paulson v. Weeks (Ore.)* 1918D-741.

(Annotated)

27. Ordinarily the question of what is a reasonable time for the exercise of such an option must be submitted to the jury. *Paulson v. Weeks (Ore.)* 1918D-741.

(Annotated)

28. The buyer of stock in a mining company, who waits for more than seven years from the date of the contract of sale, more than five years from the completion of the sale, and more than three years from the time he becomes dissatisfied, before exercising his option to demand rescission, fails to exercise such option within a reasonable time. *Paulson v. Weeks (Ore.)* 1918D-741.

(Annotated)

29. Liability on unpaid subscription.—A corporation's right to recover in an action on the unpaid subscriptions of certain stockholders will not be affected by the fact that another stockholder is similarly indebted. *Bergman v. Evans (Wash.)* 1918C-848.

30. A showing that an agreement was made with one of the defendants, subscribing stockholders, that no assessment would ever be levied on his unpaid stock and that he would never be required to pay more than the amount already paid, in the absence of a showing that the creditors dealt with the corporation with notice of the agreement, is not such an element of fraud as will serve as a defense against the liability of the other defendants on their subscriptions. *Bergman v. Evans (Wash.)* 1918C-848.

31. Necessity of prior call.—Under *Bal. & Rem. Code*, § 3694, requiring corporate trustees to make a call for unpaid subscriptions on proper notice, and a subscription contract providing that the subscriptions should be payable on call of twenty days' notice issued by the board of directors, an action in equity by an injured stockholder, who

has paid for his stock in full, against delinquent stockholders and controlling directors for their refusal to call for unpaid subscriptions due from themselves, without alleging that any call had been made by the directors, is itself equivalent to a notice of call; and a court of equity has power to make the call on such showing. *Bergman v. Evans (Wash.)* 1918C-848.

32. Such cause, on appeal, is to be tried de novo and the complaint deemed to be amended to conform to the proofs. *Bergman v. Evans (Wash.)* 1918C-848.

33. Extent of liability.—In an action by a paid-up stockholder in a going concern to recover unpaid stock subscriptions as part of the concern's assets, the amount collectible is not limited to so much pro rata as may be required to pay creditors and wind up the affairs of the concern, if insolvent. *Bergman v. Evans (Wash.)* 1918C-848.

34. Interest on such subscriptions is properly allowed from the date when the defendants were served with written demand by plaintiff to make a call, under the rule that interest is due only from the date the subscriber is placed in default. *Bergman v. Evans (Wash.)* 1918C-848.

b. Nature of Ownership.

35. Negotiability.—Though neither in form nor character is a certificate of corporate stock negotiable paper, it nearly approximates it where indorsed in blank by the owner with power to transfer to anyone who may obtain possession as holder. *Will v. George Wiedemann Brewing Co. (Ky.)* 1918E-62.

c. Duplication of Lost Certificate.

36. Indemnity to corporation.—Where certificates of corporate stock are pledged with a bank as collateral for a loan, being endorsed by the owner with blank power of attorney, authorizing the holder to transfer or have them transferred on the books of the company, and such certificates disappear from the bank, being lost or stolen, the corporation, though it continues to pay dividends to the owner of the stock and her heirs, cannot be required by her administrator to issue new certificates until it is given a bond to indemnify it against loss, possible court costs, and attorney's fees, in case the original certificates come to light. *Will v. George Wiedemann Brewing Co. (Ky.)* 1918E-62.

(Annotated)

c. Rights and Powers of Stockholders.

(1) Management of Corporation.

37. Generally, corporate stockholders cannot act in relation to ordinary business of the corporation, and cannot control the directors in the exercise of the judgment vested in them by virtue of their office. *Manson v. Curtis (N. Y.)* 1918E-247.

38. Corporate stockholders do not confer and cannot revoke the powers of the board of directors, which are derivative only in the

sense of being received from the state in the act of incorporation. *Manson v. Curtis* (N. Y.) 1918E-247.

(2) Right to Vote.

39. Proxy.—A "proxy," as a proxy to vote shares given by one corporate stockholder to another, is an authority, by one having the right to do a certain thing, to another to do it. *Manson v. Curtis* (N. Y.) 1918E-247.

(3) Voting Trusts.

40. Definition.—A "voting trust agreement" accumulates in the hands of a person or persons corporate shares of several owners in trust for the purpose of voting them, in order, through the selection and election of directors, to control the corporate business and affairs. *Manson v. Curtis* (N. Y.) 1918E-247.

41. Validity.—Agreements between corporate stockholders, a minority in number but owning the majority of stock, made on sufficient consideration, to unite upon a course of corporate policy or action, or upon the officer whom they will elect, are valid and binding, if they do not contravene any express charter or statutory provisions, or contemplate fraud, oppression, or wrong against other stockholders, or other illegal object. *Manson v. Curtis* (N. Y.) 1918E-247. (Annotated)

(4) Actions.

42. Protection of minority stockholder.—Where minority stockholders are being deprived of their property rights by the unlawful acts of the majority, a court of equity will intervene and afford them such relief as may be necessary to adequately protect such property rights. *Thwing v. McDonald* (Minn.) 1918E-420.

5. Insolvency and Receivers.

43. Priority of claim for wages.—Labor Law (Consol. Laws, c. 31) § 9 (McKinney's Consol. Laws, Book 30, p. 37), providing that, upon the appointment of a receiver of a partnership or of a corporation organized under the laws of this state and doing business therein, other than a moneyed corporation, the wages of employees shall be preferred to every other debt or claim, does not apply to an insolvent foreign corporation. *Riverside Contracting Co v. New York* (N. Y.) 1918C-1075.

44. Labor Law, § 9 (McKinney's Consol. Laws, Book 30, p. 37), providing for the payment of wages by the receiver of a partnership or domestic corporation in preference to other debts and claims, relates only to the distribution of the assets of an insolvent corporation, and would not make such wages payable out of assets which had been assigned before insolvency. *Riverside Contracting Co v. New York* (N. Y.) 1918C-1075.

6. Foreign Corporations.

a. Rights in Respect to Real Estate.

45. A foreign trust company in accepting a trust and executing in New York the trust deed on land in Arizona, does not violate any law of Arizona. *Martin v. Bankers' Trust Co.* (Ariz.) 1918E-1240. (Annotated)

b. Statutory Regulation.

(1) Imposition of License Tax.

46. St. Mass. 1909, c. 490, pt. 3, § 56, declares that every foreign corporation shall in each year at the time of filing its annual certificate of condition pay to the treasurer and receiver general, for the use of the commonwealth, an excise tax of one-fiftieth of one per cent of the par value of its authorized capital stock, but the amount shall not in any one year exceed the sum of \$2,000. St. Mass. 1914, c. 724, § 1, declares that every foreign corporation subject to the tax imposed by the preceding act shall, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, in addition to the tax imposed, an excise tax of one one-hundredth of one per cent of the par value of its authorized capital stock in excess of \$10,000,000. The two acts were construed by the Massachusetts courts as part of one general taxing scheme; the latter removing the limitation of the first. It is held that the tax as assessed against a foreign corporation, maintaining an office in the state of Massachusetts and doing therein an intrastate and an interstate business is invalid, as a direct burden on interstate commerce. *International Paper Co. v. Commonwealth of Massachusetts* (U. S.) 1918C-617. (Annotated)

(2) What Constitutes Doing Business.

47. A single transaction does not constitute "carrying on business" within Civ. Code 1901, pars. 909, 911, forbidding foreign corporations to carry on business in the state except on compliance with certain requisites. *Martin v. Bankers' Trust Co.* (Ariz.) 1918E-1240. (Annotated)

48. The prosecution of a suit in the state is not "carrying on business" within Civ. Code 1901, carrying on any business, enterprise, or occupation in the state until it has filed a certified copy of its articles of incorporation or charter and the appointment of an agent, and has made publication of its articles of incorporation and proof thereof. *Martin v. Bankers' Trust Co.* (Ariz.) 1918E-1240. (Annotated)

49. A foreign tobacco corporation which sold its business within a state pursuant to a trust dissolution decree is held not to be "doing business" therein so as to subject it to service of process, although it owned stock in local subsidiary companies and advertised its goods and sent soliciting agents within the state. *People's Tobacco Co. v. American Tobacco Co.* (U. S.) 1918C-537.

c. Actions by and against Foreign Corporations.

50. Substitution of parties.—In an action by a foreign corporation as trustee to foreclose a deed of trust, bondholders secured by the deed of trust being the real parties in interest, even if the plaintiff is disqualified to act for failure to comply with the requirements relating to foreign corporations, the bondholders will be substituted as plaintiffs and judgment entered according to their rights. *Martin v. Bankers' Trust Co. (Ariz.)* 1918E-1240.

51. Service of process.—To subject a foreign corporation to service of process, it must be doing business of such a nature and character as to warrant the inference that it has subjected itself to the local jurisdiction and is, by its duty authorized officers or agents, present within the state or district. *People's Tobacco Co. v. American Tobacco Co. (U. S.)* 1918C-537.

52. Revocation of designation.—Where a foreign corporation conveys its branch within a state pursuant to a trust dissolution decree, its agent therein resigns, and his power of attorney is revoked by filing an instrument in the secretary of state's office, his agency to accept service for the foreign corporation ceases. *People's Tobacco Co. v. American Tobacco Co. (U. S.)* 1918C-537.

53. An instrument revoking a power of attorney to accept service for a foreign corporation's vice-president and attested by its seal is not ineffectual because not formally sanctioned by the directors, where the vice-president apparently had the necessary authority. *People's Tobacco Co. v. American Tobacco Co. (U. S.)* 1918C-537.

CORPUS DELICTI.

In prosecution for illegal sale of liquor, see **INTOXICATING LIQUORS**, 15, 16.
Cure of defects in proof of corpus delicti, see **APPEAL AND ERROR**, 67.
Proof in homicide case, see **HOMICIDE**, 4.

CORRESPONDENCE SCHOOLS.

Construction of contract for course, see **CONTRACTS**, 11.

CORROBORATION.

See **WITNESSES**, 15-18.
Of accomplices in prosecution for homicide, see **HOMICIDE**, 11.
Of prosecutrix in prosecution for seduction, see **SEDUCTION**, 3.

CORRUPT PRACTICES ACTS.

Charging illegal use of money by candidate, see **LIBEL AND SLANDER**, 5, 7-9.
Use of money of corporation for election expenses, see **ELECTIONS**, 19.

COSTS.

On appeal, see **APPEAL AND ERROR**, 121-124.
Allowance to executor in proceeding to probate will, see **WILLS**, 23.
Exclusion of costs in determining jurisdiction on appeal, see **APPEAL AND ERROR**, 5.
Taxation of fees of guardian ad litem, see **INFANTS**, 5.

1. Security.—In a suit before a justice of the peace, where, upon defendant's motion for security for costs one of plaintiff's counsel stated that he would be responsible for costs, and no further action was taken, and judgment was entered for plaintiff, the supreme court on appeal from a decree enjoining execution on the judgment, will presume that the statement was accepted by defendant. *Welch v. Hannie (Miss.)* 1918C-325.

2. It was the duty of defendant, if he so desired, to have the court pass upon his motion for security for costs, and his failure to do so waives his rights. *Welch v. Hannie (Miss.)* 1918C-325.

3. Cost bond.—Upon a motion made for a cost bond, under the provisions of section 2892, Comp. Laws 1897, it is discretionary with the court as to whether plaintiff shall be ruled to give such bond. *Roswell v. Bateman (N. M.)* 1918D-426.

COUNTIES.

Assignment of money due under building contract with county, see **ASSIGNMENTS**, 4.
County fence as necessary expense for which tax can be levied by county, see **TAXATION**, 4.

Validity of law providing for construction of county fence, see **FENCES**, 1.

COUNTY ATTORNEY.

Reference by county attorney to race of accused, see **ARGUMENT AND CONDUCT OF COUNSEL**, 2.

COURTS.

Effect of uncompleted transfer to United States by grantee from state as affecting jurisdiction of suit to cancel deed, see **PUBLIC LANDS**, 12.

Injunction against prosecution of suit in state court because of pendency of action in federal court, see **INJUNCTION**, 4.

Judicial review of apportionment of damages and assessment of benefits for public improvements, see **TAXATION**, 51.

Judicial review of discipline of member of religious society, see **RELIGIOUS SOCIETIES**, 3-6.

Jurisdiction and powers of appellate courts, see **APPEAL AND ERROR**, 2-8.

Jurisdiction of court of bankruptcy, see **BANKRUPTCY**, 5.

Jurisdiction of petition by judgment creditor of one insured by contract of casualty insurance to apply insurance money to satisfaction of judgment, see **INSURANCE**, 43, 44.

Jurisdiction of state court to foreclose mortgage as affected by subsequent proceedings in bankruptcy, see **BANKRUPTCY**, 3.

Justice's court as court, see **JUDGES**, 1.

Original jurisdiction of supreme court to hear claims against state as relieving claimant from presenting claim to state board of examiners, see **STATES**, 4.

Ousting jurisdiction of courts by contract to arbitrate, see **CONFLICT OF LAWS**, 1.

Power of court of equity to change or modify trust, see **TRUSTS AND TRUSTEES**, 35-38.

Power of court to order bill of particulars in criminal cases, see **INDICTMENTS AND INFORMATION**, 12.

Power to punish attorneys for misconduct, see **ATTORNEYS**, 18.

Presumption as to finding of intermediate court, see **APPEAL AND ERROR**, 69.

Proceedings and jurisdiction in juvenile courts, see **INFANTS**, 8-15.

Review of findings of industrial board, see **MASTER AND SERVANT**, 26.

Review of findings of trial court, see **APPEAL AND ERROR**, 49-50.

Review of findings or judgment of intermediate courts, see **APPEAL AND ERROR**, 53-57.

Review of judgment of voters, see **PUBLIC OFFICERS**, 7.

Weight of state decision on constitutionality of statute, see **CONSTITUTIONAL LAW**, 24, 25.

1. **Legislative power to create.**—The legislature has no authority to create a city court, even in a parish ward containing a city of more than 5,000 inhabitants, except in the place and stead of the justice of the peace court, which shall be thereby abolished. Therefore section 40 of Act No. 2 of 1916, attempting to create the city court of the city of Gretna with jurisdiction concurrent with that of the justice of the peace for a period of four years, violates articles 84 and 96 of the constitution. *Gretna v. Bailey* (La.) 1918E-566.

2. **Jurisdiction—Rights under patent.**—Assuming that a bill to enforce a price maintenance contract asserted rights under the patent law, a federal district court had jurisdiction to determine whether the suit arose under such law, where the question had not then been conclusively settled in the negative. *Boston Store v. American Graphophone Co.* (U. S.) 1918C-447.

3. **Rules of practice.**—Under P. S. 1346, providing that superior judges shall make all necessary rules for practice in county and chancery courts, which shall be uniform, a rule made by the superior judges has the force of law, and must be applied to all cases coming within it. *Davis v. Dunn* (Vt.) 1918D-994.

4. A rule of a county court as to practice does not govern in the face of a general rule

made by the superior judges. *Davis v. Dunn* (Vt.) 1918D-994.

5. **Federal decision binding state court.**—The construction of a federal statute is for the federal courts, and the state court must follow the rule which they announce. *State v. Hyde* (Ore.) 1918E-688.

6. **Decision of state court.**—On a question of general law involved in an admiralty suit brought in the federal district court for New York, the decisions of the highest state court are not binding. *Aktieselskabet Korn-og etc. v. Rederiakuebolaget* (U. S.) 1918E-491.

7. **Decision of higher court in lower.**—Previous decision explained.—The decisions in *Southern Ry. Co. v. Covenia*, 100 Ga. 46, 29 S. E. 219, 40 L.R.A. 253, 62 Am. St. Rep. 312, and *Atlanta Consolidated St. Ry. Co. v. Arnold*, 100 Ga. 566, 28 S. E. 224, rendered by a majority of the supreme court, were not in terms modified by the ruling in *James v. Central of Georgia Ry. Co.* 138 Ga. 415, 75 S. E. 431, 41 L.R.A.(N.S.) 795, Ann. Cas. 1913D 468; nor was there such necessary inconsistency between the two former rulings and that last mentioned that they were by force thereof modified, but they remain as decisions of a majority of the supreme court, and therefore as precedents to be followed by the court of appeals. *Holmes v. Southern R. Co.* (Ga.) 1918D-1182.

8. **Dictum.**—The expression of opinion upon a point in a case deliberately passed upon by the court should be held as judicial dictum rather than mere obiter. *Scovill Mfg. Co. v. Cassidy* (Ill.) 1918E-602.

COVENANTS.

See **DEEDS**, 8-12.

Covenant by tenant to insure, see **LANDLORD AND TENANT**, 3.

CREDIT INSURANCE.

See **INSURANCE**, 45-47.

CRIMES.

See **CRIMINAL LAW**.

Charging commission of crime as libel, see **LIBEL AND SLANDER**, 5.

CRIMINAL LAW.

1. **Criminal Statutes**, 75.

2. **Parties to Crime**, 75.

3. **Rights of Accused:**

a. **Right to Counsel before Pleading**, 75.

b. **Right to Be Present at Trial**, 75.

4. **Election between Counts**, 75.

5. **Waiver of Indictment and Jury**, 75.

6. **Admissibility and Sufficiency of Evidence**, 75.

See ASSAULT; BAIL; CONSPIRACY; DYING DECLARATIONS; FORMER JEOPARDY; HOMICIDE; INTOXICATING LIQUORS; SEDUCTION.

Capacity of infant to commit crime, see INFANTS, 7.

Continuance, see TRIAL, 1.

Crimes incidental to operation of automobiles, see AUTOMOBILES, 25, 26.

Cross examination of accused, see WITNESSES, 11.

Injunction against prosecution of criminal suits, see INJUNCTIONS, 10-13, 18.

Leading questions, see WITNESSES, 8.

Order of proof, see TRIAL, 2.

Remarks of judge, see TRIAL, 6.

Verdict in criminal cases, see VERDICT, 2-4, 6, 7.

1. Criminal Statutes.

1. Effect of subsequent abrogation of law.—One charged with violation of Local Option Law (Laws 1907, p. 297) and with previous conviction under the same act cannot plead, regarding former conviction, that during a period between that conviction and the alleged offense the law was not in force in that territory, since the vote did not repeal the law, and, if it did, such repeal would not be a remission under Rev. St. 1874, c. 131, § 4, providing that no new law shall be construed to repeal a former one as to an offense committed or penalty or punishment incurred under the former law. *People v. Brown* (Ill.) 1918D-772.

2. Parties to Crime.

2. Accomplices.—A witness, who testified that, after accused struck deceased with an iron bar, he himself stabbed him, is an accomplice. *McCue v. State* (Tex.) 1918C-674.

3. Rights of Accused.

a. Right to Counsel before Pleading.

3. A person accused of crime is not entitled to the benefit of counsel to advise him as to whether or not he shall confess, but only for defense, and when the record in a criminal case does not disclose whether the defendant was of ability to procure counsel or whether he requested that counsel be assigned to him, it will be assumed that he failed to invoke the privilege. *State v. Heyer* (N. J.) 1918D-284. (Annotated)

b. Right to Be Present at Trial.

4. If defendant in a criminal case voluntarily absents himself from the courtroom during the trial, it is the duty of accused or his counsel to inform the court of his absence, so that the court may then correct the situation. *Thomas v. State* (Miss.) 1918E-371. (Annotated)

5. Waiver.—There is no difference in value or sacredness of accused's right to be present on the trial, whether it is granted by constitution, statute, or common law, and it may be waived in any event. *Thomas v. State* (Miss.) 1918E-371. (Annotated)

6. Code 1906, § 1495 (Hemingway's Code, § 1253), authorizing accused to waive right to be present at any stage of trial at the discretion of the court, if he is in custody and consents, does not violate Const. 1890, § 26, giving the accused a right to be heard, and is valid. *Thomas v. State* (Miss.) 1918E-371. (Annotated)

7. Such statute merely gives the accused an additional privilege of waiving presence. *Thomas v. State* (Miss.) 1918E-371. (Annotated)

8. Under such statute, the accused may waive presence, even in a capital case. *Thomas v. State* (Miss.) 1918E-371. (Annotated)

9. Since such statute provides that waiver shall be at the discretion of the court, if it appears that the accused did not receive a fair and impartial trial, a new trial will be granted, although failure to secure a fair and impartial trial was on account of accused's waiver of presence. *Thomas v. State* (Miss.) 1918E-371. (Annotated)

10. Under such statute, where one accused of murder goes from the courtroom without the knowledge of the judge or the attorneys, but in custody of an officer, for a few minutes, and makes no objection at any time to the progress of the trial in his absence, he waives his presence. *Thomas v. State* (Miss.) 1918E-371. (Annotated)

11. Reception of verdict.—A verdict in a prosecution for violation of the Local Option Law may be rendered in the absence of accused and his attorney. *People v. Brown* (Ill.) 1918D-772.

4. Election between Counts.

12. An unlawful act relied on by the state as the basis for the charge of manslaughter may be made unlawful by more than one statute. In such case it is error to compel the state to elect upon which statute it relies for a conviction. *State v. Schaeffer* (Ohio) 1918E-1137.

5. Waiver of Indictment and Jury.

13. Order for trial.—When a person who is charged with an offense triable before the court of quarter sessions waives indictment and trial by jury and requests to be tried immediately before the court, it is not necessary for the judge to sign an order in writing for the trial of the accused. *State v. Heyer* (N. J.) 1918D-284.

6. Admissibility and Sufficiency of Evidence.

14. Rebutting proof of alibi.—Where the defense of alibi was that accused spent the entire day and night of the killing in his father's home, testimony that a witness heard accused on the night of the crime while he was in another room of an immoral resort is admissible. *McCue v. State* (Tex.) 1918C-674.

15. Where accused offered evidence to show that he was at home on the day and night of the killing, testimony that accused was seen drinking with deceased on the evening

of the murder is admissible. *McCue v. State* (Tex.) 1918C-674.

16. Testimony that a witness saw accused downtown on the afternoon of the murder and saw him later that evening is also admissible. *McCue v. State* (Tex.) 1918C-674.

17. Where accused claims that he spent the entire day and night of the killing in his father's home, testimony in support of an accomplice, who claimed to have met accused in an immoral resort, that on the night of the killing the accomplice and accused visited the resort, where they removed their blood-stained clothing and spent the rest of the night smoking hop, is admissible. *McCue v. State* (Tex.) 1918C-674.

18. Where accused claims that on the day of the killing he had remained in his father's house, and there was evidence tending to show that he had spent that night in an immoral resort, testimony that, some days after, he was arrested when leaving such resort, is admissible. *McCue v. State* (Tex.) 1918C-674.

19. Where accused claims to have been in his father's house on the day and evening of the homicide, testimony that a witness saw him on the afternoon of the killing in a saloon drinking with another person is admissible. *McCue v. State* (Tex.) 1918C-674.

20. Testimony that the companion of a former witness saw two men drinking as detailed by such witness, though he did not know and could not recognize accused, as the other witness had, is admissible in corroboration. *McCue v. State* (Tex.) 1918C-674.

21. Evidence incidentally discrediting accused.—In a prosecution for homicide, the fact that evidence of accused's visits to saloons and the lowest of dives may necessarily have a prejudicial effect does not render such testimony inadmissible, where it is vitally connected with the evidence to show accused's guilt. *McCue v. State* (Tex.) 1918C-674.

CROPS.

Value of growing crops as included in damages for taking of land, see **EMINENT DOMAIN**, 8, 12.

CROSS-EXAMINATION.

See **WITNESSES**, 10, 11.

CROSSINGS.

Liability for injuries to persons at railroad crossings, see **RAILROADS**, 14-20.

Liability of owner of automobile for injury at railroad crossing to person riding in automobile, see **AUTOMOBILES**, 16, 17.

Negligence of railroad as excusing negligence of street railroad for injury to passenger of latter, see **CARRIERS OF PASSENGERS**, 9.

Width to be maintained at railroad crossings, see **RAILROADS**, 5.

CUMULATIVE EVIDENCE.

Newly discovered evidence of cumulative nature as ground for new trial, see **NEW TRIAL**, 3, 4.

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See **BANKS AND BANKING**, 1-3.

CUSTOMER.

Injury by fall down elevator shaft, see **ELEVATORS**, 2, 6.

DAMAGES.

See **AGENCY**, 10; **CONVERSION**, 5; **DEATH BY WRONGFUL ACT**, 20, 21.

For refusal of seller to deliver goods, see **SALES**, 6.

For wrongful issuance of injunction, see **INJUNCTIONS**, 21.

In actions against carriers of goods, see **CARRIERS OF GOODS**, 20-25.

In actions, for delay in delivery or failure to deliver telegraph messages, see **TELEGRAPHS AND TELEPHONES**, 4, 7-9.

In actions for libel or slander, see **LIBEL AND SLANDER**, 65-70.

Instruction as to mitigation of damages in action for libel, see **LIBEL AND SLANDER**, 63, 64.

Measure of damages for breach of warranty of germination of seeds, see **WARRANTY**, 4.

On breach of automobile sales agency contract, see **DAMAGES**, 10.

Review of question of damages, see **APPEAL AND ERROR**, 48, 56, 57.

1. **Mitigation of damages.**—In an action for personal injury, the defendant cannot show, either as a bar to the action or in reduction to the damages, that the injured person received, or was entitled to receive, compensation for his injury in form of insurance or otherwise. *Ridgeway v. Sayre Electric Co.* (Pa.) 1918D-1.

2. **Elements—Humiliation from disfigurement.**—Humiliation or mortification to arise in the future on account of disfigurement of person is a proper element of damage in an action for personal injury. *Patterson v. Blatti* (Minn.) 1918D-63. (Annotated)

3. **Measure of damages—Action for tort.**—This court has committed itself to the doctrine that the rules governing the assessment of damages are the same in tort as in contract, except where a tort is committed under such circumstances as to warrant the allowance of exemplary damages. *Florida East Coast R. Co. v. Peters* (Fla.) 1918D-121.

4. **Evidence.**—In suit for damages for misrepresenting the acreage of land leased, it is error to exclude from the consideration of the jury evidence of items of damage suffered by plaintiffs making up the necessary and reasonable expenditures incurred by

them in preparing to cultivate the land, since the jury should have such information, coupled with other proof, as will enable them to determine the extent of the damage, if they find certain facts favorably to plaintiff. *McNeer v. Norfleet* (Miss.) 1918E-436.

5. **Duty to permit remittitur.**—Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 1631, providing that it shall be the duty of a court of civil appeals, when of opinion that the verdict is excessive, to indicate to the party in whose favor the judgment was rendered, or his attorneys of record, the amount of excess and the time within which he may file a remittitur, whereupon the court shall reform and affirm the judgment, in an action against the receiver of a railroad for personal injuries, the court of civil appeals should not reverse and remand the case upon the ground alone that the verdict is excessive; the statute being mandatory and requiring the court to authorize remittitur of the verdict above the amount which will be reasonable compensation for the injury in accordance with its sound judgment. *Wilson v. Freeman* (Tex.) 1918D-1203.

6. Where a verdict in an action for slander is so excessive as to clearly indicate passion or prejudice of the jury, a new trial will be ordered, rather than to order a remittitur. *Cain v. Osler* (Ia.) 1918C-1126.

7. **Excessiveness of verdict.**—In a collision between a railroad train and an automobile, a married woman, twenty-eight years old, sustained a scalp wound and a fractured pelvis, also a nervous shock or collapse with its attendant ills, which still remained with her. She was suffering from a retroverted uterus, and seven months after the collision had a miscarriage when three months in pregnancy, and there was evidence that she could never have a child because of the pelvic break. Her suffering was intense and her injuries in a degree permanent. It is held that a verdict for \$5,250, though large, was not excessive. *Avery v. Thompson* (Me.) 1918E-1122.

8. Twelve hundred and fifty dollars is not an excessive verdict in an assault and battery case, where the injury caused a permanent shortening and stiffening of the thumb and there was evidence to show expense and loss of time aggregating \$350. *Patterson v. Blatti* (Minn.) 1918D-63.

9. A verdict of \$6,500 for death of father supporting a family of ten was not excessive, although deceased was fifty-seven years of age, had one leg off six inches below the knee, and one arm was smaller than the other. *Hays v. Hogan* (Mo.) 1918E-1127.

10. Verdict of \$25,000 to widow and four minor children of healthy man with expectancy of twenty-four and one-half years, who earned \$1,800 per year, and who suffered severely for twenty hours after fall into elevator shaft in store, was not excessive. *Kress v. Markline* (Miss.) 1918E-310.

DEAD BODY.

Removal from grave or cemetery, see *CEMETERIES*, 3, 4.

DEATH.

See *DEATH BY WRONGFUL ACT*; *DYING DECLARATIONS*.

Creating presumption of survivorship by will, see *WILLS*, 39, 40, 48.

Effect of presumption of death in action on life insurance policy, see *LIFE INSURANCE*, 17.

Proof of death of insured, see *BENEFICIAL ASSOCIATIONS*, 21.

Waiver of proof of death of insured, see *LIFE INSURANCE*, 10, 11.

1. Evidence that the insured left his home eight years before the suit on a policy of mutual benefit insurance on his life, that there has been no trace of or word from him since that time, and that his whereabouts is unknown, raises the legal presumption in that suit that he is dead, proof that search has been made for the absentee not being necessary. *Page v. Modern Woodmen of America* (Wis.) 1918D-758. (Annotated)

DEATH BY WRONGFUL ACT.

1. **Limitation of Action**, 77.

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3. **Actions**:

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Action against husband for wrongful death of wife, see *HUSBAND AND WIFE*, 17.

Liability of owner of boat livery for death of patron caused by sinking of boat, see *THEATERS AND AMUSEMENTS*, 2, 3.

Statute making railroad liable for fires started by engine as authorizing recovery for death resulting from fire started by engine, see *RAILROADS*, 21.

1. Limitation of Action.

1. Laws 1898, c. 65, providing relative to actions for wrongful death that such action shall be commenced within one year after the death, contains no saving clause in favor of any person, and the court cannot ingraft any such exception upon it. *Gulf, etc. R. Co. v. Bradley* (Miss.) 1918D-554.

2. **Effect of repeal of limit after bar attached.**—Const. 1890, § 97, provides that the legislature shall have no power to revive any remedy which may have become barred by lapse of time or by any statute of limitation. Laws 1898, c. 65, required actions for wrongful death to be commenced within one year after the death. This statute was amended by Laws 1908, c. 167, by eliminating such limitation. It is held that, even disregarding the constitutional provision, the Act of 1908 did not authorize the bringing in 1913 of an action for a death occurring in 1902, as the limitation contained in the Law of 1898 was not merely a limitation of the remedy, but

of the liability itself. *Gulf, etc. R. Co. v. Bradley* (Miss.) 1918C-554.

3. A declaration alleged that in August, 1902, plaintiff's father, while in defendant's employ, was killed by reason of the negligence of other employees under circumstances rendering defendant liable; that plaintiff was born in February, 1903; that on September 30, 1902, suit was filed by plaintiff's mother in her own behalf and on behalf of another child then living to recover for the injury sustained by such death; that on the same day a final judgment was rendered in favor of the mother and such child in settlement of such injuries; and that thereafter and before plaintiff's birth such judgment was paid. It is held that this predicated the right of action upon the cause of action for the death, and not upon an agreed settlement not fully performed; and hence the requirement of Laws 1898, c. 65, that actions for wrongful death shall be commenced within one year applied. *Gulf, etc. R. Co. v. Bradley* (Miss.) 1918D-554.

2. Who May Sue.

4. Where a railroad servant, killed in interstate commerce, leaves surviving him a widow or a child or children, the action against the road for his death, under the federal employers' liability act, must be maintained exclusively for their benefit, to the exclusion of other classes of beneficiaries named in the act, such as the employee's parents. *Davis v. Cincinnati, etc. R. Co.* (Ky.) 1918E-414.

5. Divorced wife suing for death of child.—The mother and administratrix of decedent may maintain action for his death, where it appears that she and her husband had been divorced, she being remarried, that the father is alive, that the decedent has never lived with him, contributed to his support, nor been maintained by him, but gave all his earnings to her. *Clarks v. Detroit, etc. R. Co.* (Mich.) 1918E-1068.

6. Recovery for death of adopted child.—Under Rev. Laws, c. 154, § 6, authorizing the probate court to make decrees for adoption, by which, except as regards succession to property, all rights, duties, and other legal consequences of the natural relation of child and parent shall thereafter exist between the child and the petitioner and his kindred, and shall, except as regards marriage, incest, or cohabitation, terminate between the child so adopted and his natural parents and kindred, or any previous adopting kindred, the right of an adopting parent to recover for death of the child as administrator or administratrix under Rev. Laws, c. 171, § 2, as amended by St. 1907, c. 375, and under Rev. Laws, c. 51, § 17, and acts in amendment, is the same as that of a natural parent in the absence of adoption, the intent of the statute being to put an adopted child for all legal purposes, with certain exceptions, in the place of a natural child, "succession to property" meaning succession under the laws regulating the descent and distribution of in-

testate property. *Boutlier v. Malden* (Mass.) 1918C-910.

7. Parent having no pecuniary expectations from child.—Where a railroad fireman, after his divorce, carried his trunk to his parents' home, making that his headquarters, but being there only at infrequent intervals or for short times, when he would donate to his mother small sums, trifling in amount, rather as a result of affection than in recognition of any obligation to her in the way of support and maintenance, she being supplied with the necessities of life through her husband and other children, such mother has no pecuniary expectations from her son, entitling her to recover for his death under the federal employers' liability act. *Davis v. Cincinnati, etc. R. Co.* (Ky.) 1918E-414.

3. Actions.

a. Defenses.

8. Prior recovery by widow as barring rights of posthumous child.—Under Laws 1898, c. 65, providing, relative to actions for wrongful death, that there shall be but one suit for the same death, which shall inure to the benefit of all parties concerned, it was immaterial that a child of deceased was not born when a suit by her mother was instituted, as the limitation on the number of suits is without exception in favor of any person whatever. *Gulf, etc. R. Co. v. Bradley* (Miss.) 1918D-554. (Annotated)

9. A declaration in an action by a posthumous child for wrongful death alleged that a suit was filed by deceased's wife in her own behalf and on behalf of another child to recover for the death; that on the same day a final judgment was rendered in her favor for \$2,500; and that thereafter, and before plaintiff's birth, the judgment was paid. It is held that, conceding that such judgment would not bar a suit by plaintiff unless it was rendered in good faith and without collusion, there was nothing in the declaration to indicate collusion in the rendition of the judgment, as the mere fact that it was rendered on the same day the declaration was filed was insufficient for that purpose, and, for all that appeared, \$2,500 may have been full compensation for the injury. *Gulf, etc. R. Co. v. Bradley* (Miss.) 1918D-554.

(Annotated)

b. Evidence.

10. Presumptions and burden of proof.—In an action for damages for death of plaintiff's intestate, caused by sinking of boat hired of defendant, in which he, with three companions, had gone rowing, where there is no eyewitness to accident, presumption that those on board exercised due care is indulged only to relieve plaintiff from inference of negligence, and not to supply evidence of defendant's negligence. *Clark v. Detroit, etc. R. Co.* (Mich.) 1918E-1068.

11. In an administratrix's action for death of her adopted son by electric shock from a broken wire, the burden is on plaintiff affirmatively to show due care on the boy's

part in order to recover; the presumption created by St. 1914, c. 553, not applying where the cause of action occurred before the statute went into effect. *Boutlier v. Malden* (Mass.) 1918C-910.

12. Financial circumstances of widow.—In action for death of customer by falling down elevator shaft in store, testimony of the widow that her home has not been paid for is inadmissible. *Kress v. Markline* (Miss.) 1918E-310.

13. Admission of such testimony is harmless error, since the jury could not have been misled thereby. *Kress v. Markline* (Miss.) 1918E-310.

14. Insurance on life of deceased.—In action for death of customer by falling down elevator shaft in store, testimony as to amount of life insurance left by deceased is properly excluded. *Kress v. Markline* (Miss.) 1918E-310.

15. Judgment in divorce suit against deceased.—In an action against a railroad, under the federal employers' liability act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [6 Fed. St. Ann. 2d ed. 280]), for death of its fireman, it was error for the court to permit defendant to introduce in evidence, and to read to the jury on trial over plaintiff's objection, judgment in a divorce suit against decedent, ordering him to pay his divorced wife \$300 for the support of their minor child, since the child, as a dependent, is entitled to recover the pecuniary benefits which it had the right to expect from its father, who was under a legal obligation to support it during its infancy, which benefits cannot be augmented or diminished by a collateral proceeding to which the child was not a party. *Davis v. Cincinnati, etc. R. Co.* (Ky.) 1918E-414. (Annotated)

16. Sufficiency of evidence.—The evidence is held to be sufficient to warrant finding that the boy's death was preceded by conscious suffering. *Boutlier v. Malden* (Mass.) 1918C-910.

c. Instructions.

17. Submission of issue without evidence.—In an action against a railroad, under the federal employers' liability act, for death of its fireman when his train was derailed in taking a curve, where there was absolutely no proof of any facts or circumstances looking to the establishment of any contributory negligence on decedent's part, the giving of an instruction on the question of contributory negligence, allowing the jury to diminish damages therefor, is prejudicial error, since from it the jury might conclude that the court saw something in the evidence justifying the instruction, in view of the close relation between the fireman and the engineer driving the train. *Davis v. Cincinnati, etc. R. Co.* (Ky.) 1918E-414.

d. Questions for Jury.

18. Expectancy from father.—In an action against a railroad, under the federal employers' liability act, for the death of a

fireman, brought for the benefit of his infant daughter, the court should not submit the question whether the child had the right to expect pecuniary assistance from her father had he lived, since the law gave her such right, imposing on her father the duty of complying with it. *Davis v. Cincinnati, etc. R. Co.* (Ky.) 1918E-414.

19. Rendition of services by child.—Where in a suit by a parent for damages on account of loss of services of a child two years and four months old, alleged to have been negligently killed by a railway train, it was alleged that the child was precocious, strong, robust, and endowed with unusual physical powers for a child of her age, that she ran on errands, helped bring in wood, swept the house, helped to attend to plaintiff's younger child, and generally waited on plaintiff and helped in the household work, and contributed to the support of plaintiff, and that the latter was dependent upon her, and that the value of the child's services was \$3 per month, to which petition a demurrer was filed,—if considered as an original proposition, the members of this court are equally divided in opinion as to whether a court can judicially know that the facts thus alleged are as a matter of law untrue, because so unreasonable as to be legally impossible. Under this division of opinion the decision in *Atlanta Consolidated St. Ry. Co. v. Arnold*, supra, stands as a decision of a majority of this court. It involved a child alleged to be between two and one-half and three years of age (which was construed by a majority of the court, in the case of *James v. Central of Ga. Ry. Co.* supra, as being equivalent to an allegation that the child was about two and one-half years old). This includes the lesser age of two years and four months. *Holmes v. Southern R. Co.* (Ga.) 1918D-1182. (Annotated)

4. Measure of Damages.

20. Amount of recovery by child.—In an action against a railroad, under the federal employers' liability act, for death of its fireman, brought for the benefit of his infant daughter, the sum which plaintiff is entitled to recover for her is properly limited to what she had reasonable expectations of receiving from her father, if his death had not been occasioned. *Davis v. Cincinnati, etc. R. Co.* (Ky.) 1918E-414.

21. In an action against a railroad company, under the federal employers' liability act, for death of its fireman, brought for the benefit of his minor daughter, plaintiff can recover for the child only the actual pecuniary loss resulting to her, and not for the money value "of that care, counsel, training, and education" which she might have received from her father had he lived. *Davis v. Cincinnati, etc. (Ky.) 1918E-414.*

DEBTOR AND CREDITOR.

See FRAUDULENT SALES AND CONVEYANCES.

DECEDENTS' ESTATES.

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1. Requisites, 80.
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As mortgage, see MORTGAGES, 1-5.

Deed by partner as contract to convey, see PARTNERSHIP, 4.

Effect of agent's deed as contract to convey, see AGENCY, 14.

Formal requisites of deed from wife to husband, see HUSBAND AND WIFE, 15, 16.

Nature of title granted by deed of partnership, see PARTNERSHIP, 2.

Parol evidence to impeach conveyance, see EVIDENCE, 33, 34.

Parties in suit to cancel deed, see RESCISSION, CANCELLATION AND REFORMATION, 11.

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Reformation of deed as against bona fide purchaser, see VENDOR AND PURCHASER, 18.

Requisites of deed executed by mortgagee under power of sale in mortgage, see MORTGAGES, 12, 13.

Retention of premises by grantor as ground for setting aside deed, see RESCISSION, CANCELLATION AND REFORMATION, 5.

Right to revoke deed creating trust, see TRUSTS AND TRUSTEES, 40.

Sufficiency of joinder of husband to wife's deed, see HUSBAND AND WIFE, 3.

Suit to cancel grant of public lands by state, see PUBLIC LANDS, 10-21.

Tax deeds, see TAXATION, 41, 42.

1. Requisites.

1. Effect of incompleteness at time of delivery.—A deed passes no title unless delivered in a complete state in the grantor's lifetime. *Butler v. Butler* (N. C.) 1918E-638.

2. Description.—Deed tendered to one having an option on a block separated from another by a party wall properly fixes the center line of the wall as the boundary. *Weadock v. Champe* (Mich.) 1918C-874.

3. An ancient deed, referring to land by its entry number, in accordance with the custom at the time of its execution to refer to the entry and grant numbers in describing the land conveyed, is a sufficient description of the land conveyed, as the clear intention of the parties should be made effective, when the court can accomplish it by recognizing the legal and actual connection effected between the entry and grant by the issuance of the latter upon the former. *Fielder v. Pemberton* (Tenn.) 1918E-905.

2. Construction.

4. Deed referring to another instrument.—Where a timber deed refers to another instrument for its terms, it takes both instruments to show the entire contract. *Berry v. Marion County Lumber Co.* (S. C.) 1918E-877.

5. Habendum construed with premises.—A deed made pursuant to an option lumber contract contained two habendum clauses, which read "to have and to hold, all the short straw, poplar and cypress on the said five tracts of land in said five options above described and named, together with all the rights and privileges, members, rights and privileges stipulated in said option to be given to the said Cape Fear Lumber Company, their successors and assigns." "To have and to hold all and singular, the said premises before mentioned unto the said Cape Fear Lumber Company, their successors and assigns forever." It is held, that as the term "premises" is used as embracing all that part of the deed which precedes the habendum and is the proper technical sense of the term as used in conveyances, and as the deed refers to the option contract giving a limited time within which to cut and remove the timber, a second habendum clause conveyed only such privileges and rights as are set forth in the option, and not a fee in the timber. *Berry v. Marion County Lumber Co.* (S. C.) 1918E-877. (Annotated)

6. Prior accretions to land described.—A deed, conveying by metes and bounds a tract described as containing 175 acres more or less, does not include some three hundred acres of accretions which had attached to the original tract before conveyance. *Houston v. Grant* (Miss.) 1918E-243.

(Annotated)

7. Effect as to agreement for easement.—Where persons holding a contract to purchase land from a railroad company enters into an agreement with the company, giving it the privilege to remove gravel from the premises, and the company's deed, thereafter executed, conveying the land to the purchasers, makes

no mention of such agreement, the company's right to remove the gravel is lost. *Simmons v. Northern Pac. R. Co.* (Wash.) 1918C-1184.

3. Covenants Running with Land in General.

8. Whether a covenant runs with the land or is merely personal depends upon whether it concerns the use and occupation of the land or is a collateral and personal covenant, not immediately concerning the thing granted, for if the covenant concerns the land and enjoyment, its benefit or obligation passes with the ownership. *Purvis v. Shuman* (Ill.) 1918D-1175.

9. Exemption from sidewalk assessments.—Where a city, in consideration of an owner's setting his fence back twelve feet, contracts never to require the owners of the property to build or maintain a sidewalk, and that the city will at its own expense grade, build, and forever maintain a pavement for the street, the covenant is such as runs with the land. *Walker v. Richmond* (Ky.) 1918E-1084.

10. Agreement to maintain depot.—The covenant of a railroad company with a landowner, in consideration of the grant of a right of way through his lands, and of land for depot purposes, to build and operate a depot on the grantor's land is one running with the land granted, and enforceable against the grantee of the covenantor. *Harper v. Virginian R. Co.* (W. Va.) 1918D-1081.

4. Covenants of Title.

11. Special assessment as incumbrance.—Where special assessments against real estate have been declared void, but are subsequently relieved, they do not constitute an incumbrance which relates back to the original levy so as to come within a covenant of warranty against incumbrances which was entered into subsequent to the first levy and before the relevy. *Armstrong v. Banking Trust Co.* (Kan.) 1918D-972. (Annotated)

12. In an action to recover for breach of a covenant against incumbrances, it was shown that in 1902 the city of Kansas City levied special taxes against the real estate for local improvements, the assessments being payable in ten annual instalments. After they were levied and before any instalments were paid, the assessments were declared void, and their collection enjoined. On March 24, 1912, subsequent to the conveyance of the land to plaintiff, the city relieved the assessments under the provisions of section 993 Gen. St. 1909. Held the real estate was subject to reassessment of the taxes, which made them in a strict sense an incumbrance, yet they did not become an incumbrance in the sense contemplated by the covenant until they became a lien by virtue of the relevy. *Armstrong v. Banking Trust Co.* (Kan.) 1918D-972. (Annotated)

5. Recitals.

13. As reviving right of stranger.—A recital in a deed from such purchasers to a third person that the deed was subject to Ann. Cas. Dig. 1918C-F.—6.

a contract permitting the railroad company to remove gravel does not revive the company's right to remove gravel where the company is a stranger to the deed. *Simmons v. Northern Pac. R. Co.* (Wash.) 1918C-1184.

14. Ancient deed.—While recitals in a recent deed are not evidence, except as between parties to it, recitals in a deed, which has been recorded more than thirty years, and is therefore an ancient deed, that the grantors were heirs of the then record owner of the land conveyed, as heirship and family can be proved by hearsay evidence, were admissible as *prima facie* evidence of the facts recorded against strangers to the title, especially as the recitals were further corroborated by the fact that the grantee and his successor in title paid the taxes on the land and for thirty years exercised such control and public acts of ownership that it was generally known by the name of said successor in title. *Fielder v. Pemberton* (Tenn.) 1918E-905. (Annotated)

6. Proceeding to Forfeit Rights under Deed.

15. Nature.—A proceeding to declare that the rights under a master's timber deed made in an action by the parties to carry out the provisions of an option had expired, and to enjoin the exercise of any further rights under the deed and for damages; is not a proceeding to reform a deed. *Berry v. Marion County Lumber Co.* (S. C.) 1918E-877.

16. Return of consideration.—In an action to declare that the rights under a master's deed executed pursuant to a timber option had expired, the return of the money received as consideration for the deed is not necessary in the absence of an attempt to reform the deed. *Berry v. Marion County Lumber Co.* (S. C.) 1918E-877.

DEFAMATION.

See LIBEL AND SLANDER.

DEFAULT JUDGMENTS.

See JUDGMENTS, 9.

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See WORDS AND PHRASES.

DELEGATION OF POWERS.

Of corporate directors, see CORPORATIONS, 19.
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DEMAND.

As condition precedent to action for conversion, see **CONVERSION**, 2.
Necessity to allege demand to obtain reformation of instrument, see **RESCISSION**, **CANCELLATION AND REFORMATION**, 8.

DEMURRAGE.

Construction of Reciprocal Demurrage Act, See **CARRIERS**, 7.
Effect of partial invalidity of Reciprocal Demurrage Act, see **STATUTES**, 8.

DEMURRER.

See **PLEADING**, 11-14.
Admission by demurrer to petition for injunction, see **INJUNCTIONS**, 18.
Effect of demurrer to information in nature of quo warrant, see **QUO WARRANTO**, 7, 8.

DEMURRER TO EVIDENCE.

Review of judgment on demurrer to evidence, see **APPEAL AND ERROR**, 52.

DENTISTS.

Employment of unlicensed assistant as defense to action on indemnity policy, see **INSURANCE**, 26-29.
Indemnity against liability for malpractice, see **INSURANCE**, 23-29.
Liability for negligence, see **PHYSICIANS AND SURGEONS**, 11, 12.

DEPARTURE.

In pleading generally, see **PLEADING**, 15.
In pleading in action on insurance policy, see **INSURANCE**, 22.

DEPOSIT.

Deposit in lieu of bond on appeal, see **APPEAL AND ERROR**, 111, 112.
In lieu of bail, see **BAIL**, 1-3.
Requiring deposit of fare in box, see **CARRIERS**, 3, 4.

DEPOSITIONS.

1. Exhibit not attached.—Where a probated will is referred to in a deposition, it is not necessary to attach it as an exhibit, as its identity may be established by parol, although the better practice is to attach an exemplified copy. In re Clodfelter (N. C.) 1918E-281. (Annotated)

DEPOT.

Covenant to maintain, see **DEEDS**, 10.
Enforcement of contract to maintain depot, see **SPECIFIC PERFORMANCE**, 5-13.

DESCENT AND DISTRIBUTION.

See **DOWER**; **EXECUTORS AND ADMINISTRATORS**; **TRUSTS AND TRUSTEES**; **WILLS**.

1. "Children."—The word "children," as used in subdivision 3 of section 8418, Rev. Laws 1910, which provides that, if there be no issue, nor husband, nor wife, nor father, nor mother, the estate of an intestate descends in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation, does not include grandchildren of a deceased brother or sister of the intestate. Lowery v. Le Flore (Okla.) 1918E-1001. (Annotated)

DESCRIPTION.

Of beneficiary in will, see **WILLS**, 29-34, 41.
Of property in deed, see **DEEDS**, 2, 3.

DESERTION.

Allegations as to desertion in divorce suit, see **DIVORCE**, 2.
Of person in military service, see **ARMY AND NAVY**, 7.

DILIGENCE.

In discovering evidence, see **NEW TRIAL**, 2.

DIRECTION OF VERDICT.

See **VERDICT**, 10, 11.
Review of directed verdict, see **APPEAL AND ERROR**, 51.

DIRECTORS OF CORPORATIONS.

See **CORPORATIONS**, 18-22.

DIRECT PRIMARY LAW.

Withdrawal of candidacy under act, see **ELECTIONS**, 12, 13.

DISABILITY.

Compensation to employee, see **MASTER AND SERVANT**, 10, 11.
Within accident insurance policy, see **ACCIDENT INSURANCE**, 1, 2, 4.

DISBARMENT.

See ATTORNEYS, 18-21.

DISCHARGE.

Of accommodation maker of note, see **BILLS AND NOTES**, 1.

DISFIGUREMENT.

As element of damages, see **DAMAGES**, 2.

DISMISSAL AND NONSUIT.

Discontinuance by condemnor of eminent domain proceedings, see **EMINENT DOMAIN**, 15, 16.

Right to dismiss bill where cross bill filed, see **EQUITY**, 2.

1. Dismissal of part of defendants.—In an action for conspiracy to injure plaintiff in his business, the petition being amended to charge a libel against a defendant, in the absence of proof to support the charge of conspiracy, there being sufficient evidence to support the libel charge, the submission of the case, as to defendant charged with libel, and its dismissal as to the other defendants, is proper. *McClintock v. McClure* (Ky.) 1918E-96.

2. Motion for nonsuit.—On motion for judgment of nonsuit, the evidence must be construed most favorably for the plaintiff. *Krachanake v. Acme Mfg. Co.* (N. C.) 1918E-540.

3. In passing upon the sufficiency of evidence challenged by a motion for nonsuit or by a motion for judgment non obstante veredicto, it is only where the court can say as a matter of law that there is neither evidence nor reasonable inference from evidence to sustain the verdict that either of such motions can be granted. *Godefroy v. Hupp* (Wash.) 1918E-494.

DISSOLUTION.

Of corporations, see **CORPORATIONS**, 4, 5.
Of marriage, see **MARRIAGE**, 9, 10.

DISTRICT ATTORNEY.

As party to divorce suit, see **DIVORCE**, 3-5.
Right to appeal in divorce cases, see **APPEAL AND ERROR**, 11.

DIVORCE.

1. Jurisdiction, 83.
2. Pleading, 83.
3. Defenses, 83.
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5. Decree:

- a. Conclusiveness, 84.
- b. Remarriage, 84.

6. Custody and Support of Children, 84.**7. Appeal, 85.**

See **ALIMONY AND SUIT MONEY; MARRIAGE**.
Distinction between divorce and annulment of marriage, see **MARRIAGE**, 9, 10.

Effect on right of husband and wife to testify against each other, see **WITNESSES**, 3-5.

Laws governing divorce of members of Indian tribes of Oklahoma, see **INDIANS**, 2.

Necessity for bond in appeal by district attorney in divorce case, see **APPEAL AND ERROR**, 113.

Order requiring support by father of child as affecting right of child to recover for death of father, see **DEATH BY WRONGFUL ACT**, 15.

Right of district attorney to appeal in divorce cases, see **APPEAL AND ERROR**, 11.

Suit by divorced wife for death of child, see **DEATH BY WRONGFUL ACT**, 5.

Validity of contract between husband and wife facilitating divorce, see **HUSBAND AND WIFE**, 14.

Validity of marriage in foreign state within proscribed time after divorce, see **MARRIAGE**, 1, 2.

1. Jurisdiction.

1. Domicil of parties.—A British subject does not lose his domicil of origin by residence in the British Protectorate in Egypt where he is not subject to the local laws or to the jurisdiction of local courts, and accordingly an action for divorce may be maintained in England between British subjects resident in Egypt. *Casdagli v. Casdagli* (Eng.) 1918E-669. (Annotated)

2. Pleading.

2. Allegations as to desertion.—A complaint, averring that the conduct of the defendant husband had amounted to continuous and wilful desertion within the meaning of the statutes of the state of Oregon governing divorce proceedings, and which further averred that the spouses had lived separately for a space of a year, does not show a desertion for a period of one year, which, by L. O. L. § 507, is made ground for a divorce; the averments relating to the desertion being conclusions of law. *Smythe v. Smythe* (Ore.) 1918D-1094.

3. Defenses.

3. Duty of district attorney to urge defense.—As the state is, by L. O. L. § 1020, as amended by Laws 1911, p. 126, made a party to an action for divorce, the district attorney should, where the defendant makes no defense, urge any defense, as the failure of the complaint to state a cause of action, that can be made. *Smythe v. Smythe* (Ore.) 1918D-1094. (Annotated)

4. Parties.

4. When state not party to action.—Where in a divorce action the district attorney neither demurred nor answered, he did not make the state a party to the action under L. O. L. § 542, providing that to plead or demur shall constitute an appearance. *Smythe v. Smythe* (Ore.) 1918D-1094.

5. L. O. L. § 1020 as amended by Laws 1911, p. 126, declares that in any suit for dissolution of the marriage contract, the state is to be deemed a party defendant, and the plaintiff shall cause the summons to be served on the district attorney or his deputy, and it shall be the duty of such district attorney, so far as may be necessary to prevent fraud or collusion in such suit, to control the proceedings on the part of the defense, and in case the defendant does not defend in good faith, to make a defense on behalf of the state, and that the court shall not hear or determine any suit for divorce until service has been had or unless the district attorney or his duly appointed deputy waive the provisions of the action by appearing in person at the trial of the cause, or by written acknowledgement of service. No process in a divorce proceeding was served on the district attorney or his deputy, but the attorney appeared at the hearing before the referee. It is held that, as the district attorney did not answer, demur, or give notice of waiver of appearance, he was not a party to the action; his appearance before the referee not being an appearance before the court hearing the divorce suit. *Smythe v. Smythe* (Ore.) 1918D-1094.

(Annotated)

5. Decree.

a. Conclusiveness.

6. Decree not providing for alimony.—Where a wife asks alimony in a divorce action, and none is awarded, the effect is the same as if the decree had expressly denied it, and is an adjudication binding on the parties. *Spain v. Spain* (Ia.) 1918E-1225.

(Annotated)

7. Where the husband's finances were such at the time of divorce that a decree of alimony would have been unavailing, while the wife had property of her own, the failure of the divorce decree to provide for alimony cannot be treated as the result of fraud or mistake, though the wife contended her husband agreed to support her if alimony was not claimed. *Spain v. Spain* (Ia.) 1918E-1225.

(Annotated)

8. When divorce was granted, and the wife given custody of the minor child of the marriage, no such provision for alimony or support of the child was made, the husband being then bankrupt, and the wife then having several thousand dollars. Thereafter the husband remarried, and, being about to receive property from the distribution of his father's estate, the divorced wife, under Code, § 3180, providing that when divorce is decreed the court may make such order in relation to the children, property, parties, and mainte-

nance of the parties as shall be right, and subsequent changes shall be made when circumstances render them expedient, applied a modification of the original decree so as to allow alimony and provide for the support of the child of the marriage. It is held that, while provision might be made for the support of the child, the divorced wife could not be granted alimony; the original decree making no provision for any alimony, not being subject to modification and being a conclusive adjudication denying alimony. *Spain v. Spain* (Ia.) 1918E-1225. (Annotated)

9. In such case, where the husband at the time of the application was considerably indebted and his net income amounted to less than \$2,000, while the property he expected to receive from the distribution of his father's estate was about \$5,000, an award of \$2,000, together with direction for the payment of an additional \$2,000 in monthly instalments of \$30, was too drastic, and could not in any event be upheld. *Spain v. Spain* (Ia.) 1918E-1225.

b. Remarriage.

10. Marriage within proscribed time.—Under chapter 70 of the Sessions Laws of 1901, which provides that the effect of a judgment decreeing a divorce is to restore the parties to the state of unmarried persons, except that neither party to a divorce may marry within three months after the time such decree is granted, a marriage contracted by a divorced person less than three months after the decree was rendered is not void, and may not be assailed collaterally upon probate of such person's estate. *Woodward v. Blake* (N. D.) 1918E-552. (Annotated)

6. Custody and Support of Children.

11. Allowance for children—Power to modify.—Judgment, in a divorce action against the husband, ordering him to pay a sum to his wife for support of their infant child, may be opened up at any time by appropriate proceedings and additional allowances made. *Davis v. Cincinnati, etc., R. Co.* (Ky.) 1918E-414.

12. Decree not providing for maintenance.—The duty and responsibility of parents for the maintenance and education of minor children are not altered by the rendition of a decree of divorce in which no provision is made for the children, and the obligation of the father therefor is not canceled by the fact that the divorce was granted to him because of the fault of the mother. *Rowell v. Rowell* (Kan.) 1918C-936. (Annotated)

13. In such case and where the father neglects to provide for the maintenance and care of the minor children and leaves that burden entirely to the mother she is entitled to recover from him a reasonable amount for the expenditures she has made in providing for their care and support. *Rowell v. Rowell* (Kan.) 1918C-936. (Annotated)

14. While an independent action may be maintained by the mother for such relief, the more appropriate and complete remedy is by

opening the decree of divorce wherein an allowance may be made for past as well as future support of the children. *Rowell v. Rowell* (Kan.) 1918C-936.

15. While a divorce dissolves the marriage status, it does not relieve a father from supporting his minor children, and, though no provision of support of minor children of the marriage, who were awarded to the wife, was made in the divorce decree, a subsequent application to compel the divorced father to support such children may be entertained. *Spain v. Spain* (Ia.) 1918E-1225.

16. **Nonsupport by nonresident parent.**—Where by the misconduct of a husband and father in another state his wife and children are compelled to leave him, and they come to Kansas, and where in an action in which personal service has been had upon him she obtains a divorce and a decree awarding her the custody of the children, and requiring him to make periodical payments for their support, he may thereafter, while in another state, be guilty of a violation of the statute referred to, by failing to provide in any way for the children, notwithstanding that they were brought into this state without his knowledge or consent. *State v. Wellman* (Kan.) 1918D-1006.

7. Appeal.

17. **Right of state to appeal.**—Where the state was not made a party to and did not appear in an action for divorce, as required by L. O. L. § 1020, as amended by Laws 1911, p. 126, the state may appeal from the judgment of divorce, which is void as to it, for the decree cannot as to it be classed as one for want of an answer described in section 549, declaring that any party to a decree or judgment other than a judgment or decree given by confession or for want of an answer may appeal. *Smythe v. Smythe* (Ore.) 1918D-1094. (Annotated)

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What constitutes doing business by foreign corporation, see CORPORATIONS, 47-49.

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DOWER.

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Power of executor to deprive widow of life estate under power of sale, see EXECUTORS AND ADMINISTRATORS, 14.

1. **Lands subject to executory limitation.**—A widow is entitled to dower in the estate held by her husband in fee, subject to executory limitations. *Sheffield v. Cooke* (R. I.) 1918E-961.

2. Where land was devised in fee subject to executory limitations and after the death of a devisee considerable amount of the real estate had been sold and the proceeds of sales used necessarily for the payment of various charges, the widow of the devisee who did not release dower has no claim for dower either in the real estate so sold or in the proceeds so expended. *Sheffield v. Cooke* (R. I.) 1918E-961.

3. Where unimproved land is devised subject to executory limitations and power of sale in trustees, as the power of sale is not mandatory but was to be exercised only to enable the trustees to pay annuities, charges, taxes, and assessments, placed upon the estate by the will, the will does not work an equitable conversion of the real estate, and the widow of the devisee is entitled to dower in the land and in the proceeds not necessary to pay the enumerated charges, the wife's dower not being superior to the liens or incumbrances created prior to the husband's title, in incumbered property of the husband. *Sheffield v. Cooke* (R. I.) 1918E-961.

4. **Dower in proceeds of sale.**—Although a widow may be awarded a gross sum as dower in the proceeds of sales of land, such an award may be made only when the circumstances justify it. *Sheffield v. Cooke* (R. I.) 1918E-961.

5. Under Gen. Laws 1909, c. 329, § 2, providing that where inheritances are entire, and no division can be made, so that a woman can be endowed of the thing itself, she shall be endowed in a special and certain manner, as of a third part of the rents, and section 17, providing for the same mode of assignment in suits in equity, where a widow is entitled to dower in the proceeds of the sale of real estate left to her husband in trust, subject to executory limitations and power of sale in trustees, she will be allowed annually the legal interest on one-third of the total proceeds derived from the sale of real estate, less the payment of the necessary charges and expenses for that year. *Sheffield v. Cooke* (R. I.) 1918E-961.

6. **Rights of widow before assignment.**—A widow who has elected to take dower, instead of under the will is not entitled to the possession of any particular tract, against the devisees or heirs, until after the commissioners have set off her dower to her. *Scot-ten v. Moore* (Del.) 1918C-409.

DRAINS AND SEWERS.

Drain pipe as easement, see EASEMENTS, 3.

DRESSMAKING SHOP.

As manufacturing establishment, see **LABOR LAWS**, 10-11.

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Appropriation of land by dummy corporation, see **EMINENT DOMAIN**, 3.

DUPLICITY.

In pleading, see **PLEADING**, 10.

DYING DECLARATIONS.

See **ADMISSIONS AND DECLARATIONS; EVIDENCE**.

1. **Foundation for admission.**—It is the province of the court to determine in the first instance, the admissibility of declarations offered in evidence as dying declarations, and for the purpose of proving the declarant's sense of impending death, expressions or statements of the deceased are always admissible, if made at or about the time the dying declarations were made; and in this case it was the duty of the court to hear the evidence offered by the defendant, before determining that the dying declarations were incompetent and inadmissible. *Morehead v. State (Okla.) 1918C-416.*

2. **Impending death.**—The rule is universal that before dying declarations can be admitted in evidence it must appear that they were made under a sense of impending death, but it is not essential that the declarant state that they are so made. It is sufficient if it satisfactorily appears in any manner that they were made under that sanction. *Poling v. State (Okla.) 1918E-663.*

3. **Dying declarations, to be admissible,** must be made under a sense of impending death; but it is not necessary that the declarant state that he is expecting immediate death. It is enough if, from all the circumstances, it satisfactorily appears that such was the condition of his mind at the time of the declarations. *Morehead v. State (Okla.) 1918C-416.*

4. **Manner of making.**—Dying declarations may be made by signs as well as by words, and where the declarant is in a dying condition, and so injured as to be unable to speak, the fact that in response to questions her answers were indicated by nodding and shaking her head, and pointing her finger, forms no objection to the competency and admissibility of such declarations. *Poling v. State (Okla.) 1918E-663.*

5. **Admissibility on behalf of accused.**—On a trial for murder the dying declarations of the deceased are not limited as evidence in favor of the state alone but are equally admissible in favor of the defendant. *Morehead v. State (Okla.) 1918C-416.* (Annotated)

6. **Declarations of third person.**—The declaration of a third person who was fatally wounded by the accused's victim is inadmissible, on the accused's behalf, as a dying declaration. *Holland v. State (Ark.) 1918C-578.* (Annotated)

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Leaving where accessible to children, see **EXPLOSIONS AND EXPLOSIVES**, 4, 5.

EASEMENTS.

Loss by failure to mention in deed, see **DEEDS**, 7.

Right of guardian to impose servitude on sale of property, see **GUARDIAN AND WARD**, 1.

Right of one tenant in common to grant, see **TENANTS IN COMMON**, 1.

1. **Implied reservation or grant.**—To raise an implied reservation or grant of an easement the existing servitude must at the time of the deed be apparent, continuous and strictly necessary. *Miller v. Skaggs (W. Va.) 1918D-929.*

2. It is a general rule of the common law, applicable in such cases, that when the owner of two tenements sells one of them, or the owner of an entire estate sells a portion thereof, the purchaser takes the tenement or portion sold with all the benefits and burdens which appear at the time of the sale to belong to it, as between it and the property which the vendor retains. *Miller v. Skaggs (W. Va.) 1918D-929.*

3. **Visibility.**—An apparent easement need not be actually visible. It is enough that the facts and circumstances, fairly construed, will disclose it as in the case of a drain pipe under the surface into which the water is conducted from a roof. *Miller v. Skaggs (W. Va.) 1918D-929.*

4. **Meaning of "necessary."**—The rule of strict necessity applicable to an implied reservation or grant of an easement is not limited to one of absolute necessity, but to reasonable necessity, as distinguished from mere convenience. *Miller v. Skaggs (W. Va.) 1918D-929.* (Annotated)

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1. Title of plaintiff.—Plaintiffs in ejectment must recover on the strength of their own title, not on the weakness of defendant's. *Scotten v. Moore* (Del.) 1918C-409.

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1. Constitutionality of Election Laws.

1. Provision for second choice voting.—Primary Election Law 1915, §§ 14, 15, 26, 27, 28, 29, providing for second choice voting at primaries, is not violative of Const. art. 2, § 2, prescribing the qualifications of electors, and article 5, § 5, providing that the persons, respectively, having the highest number of votes for governor and lieutenant governor, shall be elected, but, in case two or more persons shall have an equal and the highest number of votes for either office, the general assembly shall, by joint vote, forthwith proceed to elect one of the said persons governor or lieutenant governor, as the case may be, on the ground that the constitution contemplates a single vote by each elector, since primary elections were not contemplated by such constitutional provisions. *Kelso v. Cook* (Ind.) 1918E-68.

2. Statute authorizing nomination by different methods.—Primary Election Law 1915, § 14, authorizing the nomination of governor and United States senator by state-wide primary, while requiring nominations for other state officers to be made at state conventions, is not violative of Const. art. 1, § 23, providing that the general assembly shall not grant

to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens. *Kelso v. Cook* (Ind.) 1918E-68.

3. Requiring payment of fees by candidates.—Primary Election Law 1915, § 13, requiring candidates to pay into the state and county treasury a fee equal to one per cent of the annual salary of the offices they seek, is violation of Const. art. 1, § 23, providing that the general assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens. *Kelso v. Cook* (Ind.) 1918E-68.

2. Nominations and Primary Elections.

a. In General.

4. Nature of primary election.—The primary election provided by the Primary Election Law of 1915, occurring at regular intervals, is a "general election" and not a "special election." *Kelso v. Cook* (Ind.) 1918E-68.

b. Qualification of Voters.

5. Validity of Primary Election Law.—Primary Election Laws 1915, § 10, requiring an oath of party allegiance from a challenged voter, is not violative of Const. art. 2, § 13, providing that all elections by the people shall be by ballot, which contemplates a secret ballot, as requiring the voter to disclose how he voted at the preceding election and how he intends to vote at the coming one, since the statute does not require the challenged voter to specifically state for whom he previously voted, but merely that he voted for a majority of the party's candidates, and there is nothing in the constitutional provisions making it unlawful for one to voluntarily state how he voted or intends to vote. *Kelso v. Cook* (Ind.) 1918E-68.

6. Primary Election Law 1915, § 10, providing that each qualified voter of the precinct who at the last preceding general election voted for a majority of the regularly nominated candidates of the party holding the primary shall be entitled to vote at it, provided he was registered as a voter at such previous general election, and that if he was not registered he shall make a prescribed affidavit, upon being challenged, as provided, by any voter at the election, is not violative of Const. art. 2, § 13, providing that all elections by the people shall be by ballot and all elections by the general assembly, or either branch thereof, shall be viva voce, on the theory that any qualified legal voter of the precinct, regardless of party, may challenge anyone demanding any party ballot, for lack of previous adherence to the party whose ballot he demands, in which case the one challenged cannot vote unless making the prescribed oath of party allegiance, since one may waive any right conferred for his own benefit, whether contractual, statutory, or constitutional, unless the relinquishment is detrimental to the public, so that the test in the form of a fealty oath, intended solely

for the benefit of political parties interested, may be waived by the particular party whose right is involved, and members of no other party may question the voter's right. *Kelso v. Cook* (Ind.) 1918E-68.

7. The Primary Election Law of 1915 (Acts 1915, c. 105) is not invalid as contravening, by providing different qualifications for voting in primaries, including tests of party affiliation, Const. art. 2, § 2, providing that in all elections every male citizen of the United States, twenty-one years or older, who shall have resided in the state for six months, in the township sixty days, and the ward or precinct thirty days immediately preceding such election, and every male of foreign birth of the same age, residence, etc., who shall have declared his intention to become a citizen of the United States, shall be entitled to vote in the township or precinct where he may reside, if he shall have been duly registered according to law, since the constitutional provision does not govern primary elections, as the words "primary election" are well understood to mean the act of choosing candidates by political parties to fill the various offices, and the word "election" means the final choice of the electors to fill such offices, while to assume that the provision governs primary elections would destroy the possibility of political organization by parties, which must, necessarily, be able, by test of affiliation, to exclude voters hostile to them from voting to select their candidates. *Kelso v. Cook* (Ind.) 1918E-68. (Annotated)

8. Primary Election Law 1915, § 10, providing that each qualified voter of the precinct who at the last preceding general election voted for a majority of the regularly nominated candidates of the party holding the primary shall be entitled to vote at it, provided such elector was registered as a voter at such previous general election, etc., is not violative of Const. art. 1, § 23, providing that general assembly shall not grant to any citizen or class of citizens privileges or immunities which on the same terms shall not equally belong to all citizens, as excluding, by the test of participation in a primary, those who were duly registered for, but did not vote at, the preceding general election on account of unavoidable accident, etc., and as permitting to participate those who were too young to register and vote. *Kelso v. Cook* (Ind.) 1918E-68.

9. Primary Election Law 1915, § 10, providing that each qualified voter of the precinct, who, at the last preceding general election, voted for a majority of the regularly nominated candidates of the party holding the primary, shall be entitled to vote at it, provided he was registered as a voter at such previous general election, etc., is not violative of Const. art. 2, § 1, declaring that all elections shall be free and equal. *Kelso v. Cook* (Ind.) 1918E-68.

10. Right to challenge voter at primary.—Under the Primary Election Law of 1915, any voter of a precinct may challenge any

nonresident who offers to vote. *Kelso v. Cook* (Ind.) 1918E-68.

c. Withdrawal of Candidacy.

11. The right to seek election to any office is open to all persons possessing the constitutional or statutory qualifications, but a citizen is under no obligation to seek an election to any office, and may be a candidate or refuse to be such at his option. *Bordwell v. Williams* (Cal.) 1918E-358. (Annotated)

12. Though all necessary steps have been taken to enable one to become a candidate for nomination for the office of United States senator under the Direct Primary Law (St. 1913, p. 1379), and within the 35 days before election allowed by section 5, subd. 4, he has filed with the secretary of state his affidavit stating that, if nominated, he would accept and not withdraw, and would qualify if nominated and elected, and his name has been certified to county clerks, with directions to print it on the primary ballot as a candidate, and his name has been published as required by section 10, and put on sample ballots, he may withdraw as a candidate. *Bordwell v. Williams* (Cal.) 1918E-358. (Annotated)

13. Under the Direct Primary Law, section 10 of which requires the county clerk to publish the names appearing upon the list certified to him by the secretary of state, section 12, providing that the names of all candidates for whom nomination papers have been filed shall be printed on the ballot, and section 27, authorizing an application to the supreme court in case of error, omission, or wrongful act in placing any name on an official primary election ballot or in printing such ballot, and authorizing the court to order the officer to correct the error, the county clerk acts ministerially in publishing the names certified to him, and, where a candidate withdraws after the secretary of state has made his certificate, the court, by mandamus, may compel the county clerk to omit such candidate's name from the ballot to be used in a forthcoming primary election. *Bordwell v. Williams* (Cal.) 1918E-358.

3. Submission of Questions.

14. Submission of double proposition.—If two unrelated propositions are submitted on a single ballot in such manner that one is burdensome and coercive so as to suppress the voters' will upon the other, the courts will closely scrutinize the elections so held. *Keith v. Lockhart* (N. C.) 1918D-916.

15. An election under a statute providing for submission to the voters of the double proposition whether the fence law should be adopted and whether a stipulated tax for the construction of fences should be levied, to be voted upon at the same election and by the same ballot, if otherwise valid, may be construed as a sufficient expression on both questions, and an affirmative vote would authorize the levy of the tax. *Keith v. Lockhart* (N. C.) 1918D-916.

16. Where a statute by two separate provisions authorizes an election to determine

the question whether the stock law should be retained or fences should be constructed, and also authorizes the submission of the question of a tax for the construction of fences, and the method of computing the tax is invalid, an election held upon both propositions, but one ballot being used, was not invalidated entirely, but was good as to the stock-law provision and void only as to the tax. *Keith v. Lockhart* (N. C.) 1918D-916.

4. Qualification of Voters.

17. Legislative control.—The provisions of section 1, article V of the constitution, which prescribe the qualifications of electors, control in all elections held to fill offices which the constitution itself has provided for, and in all elections upon questions submitted to a vote pursuant to provisions of the constitution; and such qualifications can be altered only by amendment to the constitution. *State v. French* (Ohio) 1918C-897.

18. Grant of right to women by municipal charter.—The constitution itself having by article XVIII committed to any municipality the power to frame and adopt a charter for its government and to exercise thereunder all powers of local self-government, subject to the limitations expressed in that article, a provision in the charter of a municipality, adopted in full compliance with the article referred to, which confers upon women the right to vote for all municipal elective officers and to be appointed or elected to and hold any municipal office provided for in such charter, is valid. (*Mills v. City Board of Elections et al.* 54 Ohio St. 631, and *State ex rel. v. City of Cincinnati et al.* 19 Ohio 178, approved and followed.) *State v. French* (Ohio) 1918C-896.

5. Corrupt Practices Acts.

19. Prohibition of contribution by corporation.—A manager or director of a corporation, paying to a "Personal Liberty League" money of the corporation for expenses in opposing local option at a town election, is held to be punishable, under Pub. Acts 1913, No. 109, § 14, providing that no director of a corporation shall pay money thereof to any political committee for any election expenses. *People v. Gansley* (Mich.) 1918E-165. (Annotated)

ELECTRICITY.

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See LIGHTING DISTRICTS.

Liability of city and electric company for injury to pedestrian resulting from picking up electric wire, see **STREETS AND HIGHWAYS**, 13-15.

1. Care Required in General.

1. If land between a house and an electric wire pole was used by the public as a playground and for purposes of travel for thirty years, electric companies stringing wires on the pole are charged with notice that persons might at any time be upon the land with the permission of the owner. *Boutlier v. Malden* (Mass.) 1918C-910.

2. If electric companies maintain poles upon a highway and near the line between the highway and an open lot used by the public with the owner's permission, on which poles wires were attached carrying a high voltage of electricity, the companies are bound to exercise reasonable care to maintain their wires so that persons rightfully on the lot will not be injured. *Boutlier v. Malden* (Mass.) 1918C-910.

3. Wires maintained over private premises.—A member of a theatrical company, which had rented a lot for tent shows and who was supposed to assist in packing paraphernalia, is not a trespasser while on the premises, and where a light company negligently allowed its wires over the premises to sag so that they came in contact with paraphernalia on a wagon it cannot defeat recovery by the actor who had not completely packed his personal belongings, for injuries received when he mounted the wagon, on the ground that the actor was a trespasser. *Lancaster Electric Light Co. v. Taylor* (Ky.) 1918C-591.

(Annotated)

4. In such case the question whether the actor was a volunteer is held to be for the jury. *Lancaster Electric Light Co. v. Taylor* (Ky.) 1918C-591.

(Annotated)

5. Wires in proximity to those of another company.—An electric company, whose wires by agreement are strung on the same poles as those of a telephone company, and which carry a heavy current, is bound to see that its wires are in such reasonably safe condition as to afford protection from injury to employees of the telephone company coming in contact with them in the course of their employment. *Ridgeway v. Sayre Electric Co.* (Pa.) 1918D-1.

(Annotated)

2. Injury to Children.

6. Electric companies, whether rightfully upon the land of another or not with their wires crossing it, owe the duty to a boy on the land in the owner's right to use due diligence to maintain and manage their electric wires so that he shall not be injured. *Boutlier v. Malden* (Mass.) 1918C-910.

7. A boy on land in proximity to an electric wire pole by the implied invitation of the owner of the land is there in the owner's right, and has the same rights against electric companies whose wires are strung on the pole as the owner would have had. *Boutlier v. Malden* (Mass.) 1918C-910.

8. If an open space between a house and electric wire pole had been used by the public as a playground and a common passageway, and had been used for travel by persons traveling between two streets, and such uses

had been made with the knowledge and consent of the owner, there was an implied invitation by the owner to the public to travel over the space, and a boy using the space is not a trespasser against the owner, but rightfully on the land by his permission. *Boutlier v. Malden (Mass.)* 1918C-910.

3. Concurring Negligence of Another Company.

9. Though an electric company did not own high-tension wires below its own on its poles, if the high-tension wires were placed under its own with its knowledge, the electric company may be found liable for death of a boy from shock when he touched the electric company's wire, which had broken and fallen against the high-tension wires below, the insulation on which was defective, if the electric company failed to adopt such precautions as were reasonably necessary to avoid danger to persons lawfully traveling on the highway. *Boutlier v. Malden (Mass.)* 1918C-910. (Annotated)

10. If the poles and wires of defendant electric company are maintained without permission of a town or a city, and, without any permission, it authorizes another electric company to place wires upon its poles, negligence of the electric company is thereby shown. *Boutlier v. Malden (Mass.)* 1918C-910. (Annotated)

11. Joint Liability.—Where an electric company maintains an uninsulated wire in close proximity to the wires of another company and a foreman of the latter company sends a lineman to work on its wires without cautioning him as to the dangerous situation thus created, both companies may be held liable for injuries received by the lineman from coming in contact with the uninsulated wire. *Toronto v. Lambert (Can.)* 1918D-57. (Annotated)

4. Actions for Injuries.

a. Evidence.

12. Franchise regulating placing of wires.—A provision in an electric light company's franchise, requiring all wires upon poles to be not less than twenty-five feet above the ground or street, and to be placed at a greater or less height above the ground whenever directed by the city, has reference only to the stringing of wires on streets or highways of the city, and not to the placing of wires on private property rented by the owner at different times for amusement purposes; and, in an action for injuries caused by the sagging of a wire so placed, it is error to permit the franchise to be read in evidence. *Lancaster Electric Light Co. v. Taylor (Ky.)* 1918C-591.

b. Questions for Jury.

13. Electric light wires charged with only slightly over two hundred volts are manifestly dangerous, and in an action for injuries resulting from negligent maintenance of such wires over private property the sub-

mission to the jury of the question whether they were dangerous is proper. *Lancaster Electric Light Co. v. Taylor (Ky.)* 1918C-591. (Annotated)

14. In an administrator's action for death of her adopted son by electric shock when he touched an electric company's wire hanging in the street beside the sidewalk, question of the negligence of the company which owned the wire is held to be for the jury. *Boutlier v. Malden (Mass.)* 1918C-910. (Annotated)

15. The question whether the company against whose high-tension wire the broken wire fell, becoming charged with the deadly current, was negligent, is held to be for the jury. *Boutlier v. Malden (Mass.)* 1918C-910. (Annotated)

16. In an action against an electric company for the death of plaintiff's husband, a telephone lineman, from contact with defendant's defectively insulated wires, it is held on the evidence, that defendant's negligence was for the jury. *Ridgeway v. Sayre Electric Co. (Pa.)* 1918D-1. (Annotated)

17. In such case, where the break in the insulation of defendant's wire was plainly visible, but where it was not decedent's duty to examine defendant's wires, and he had no knowledge that such defective wire was carrying a high current, his contributory negligence is for the jury. *Ridgeway v. Sayre Electric Co. (Pa.)* 1918D-1. (Annotated)

18. Contributory negligence.—A seventeen-year-old boy is not negligent as matter of law because upon a dark and stormy night he fails to see a broken electric wire lying in the grass, or because he mistakenly believes that sparks emanating from it are fireflies; the question whether he failed to exercise due care being a question for the jury. *Boutlier v. Malden (Mass.)* 1918C-910.

ELECTRIC RAILWAYS.

See STREET RAILWAYS.

ELEVATORS.

Excessiveness of damages in action for injuries sustained by falling into elevator shaft, see DAMAGES, 10.

Showing dangerous character of elevator shaft by previous accidents, see EVIDENCE, 6.

1. Notice to owner of negligent operation.—Negligent operation of an elevator in a store, for two years, by leaving the shaft door open, charges the storekeeper with notice of the manner of operation. *Kress v. Markline (Miss.)* 1918E-310.

2. Presumption.—Where a customer went to a counter to purchase a jardiniere, the presumption obtains, in an action for his death by falling down an elevator shaft, in the absence of contrary evidence, that in going behind the counter he did so to continue his examination preparatory to pur-

chasing. *Kress v. Markline* (Miss.) 1918E-310. (Annotated)

3. The presumption, in the absence of contrary evidence, being that the deceased customer exercised due care and caution for his safety, contributory negligence must be pleaded and proved by defendant storekeeper unless established by plaintiff's testimony. *Kress v. Markline* (Miss.) 1918E-310. (Annotated)

4. Sufficiency of evidence.—The evidence is held to show that a customer, while in a store, fell into an open elevator shaft, while inspecting goods preparatory to purchase. *Kress v. Markline* (Miss.) 1918E-310. (Annotated)

5. Instructions.—In action for death of customer by falling into elevator shaft, defendant cannot complain of instruction that, to warrant verdict for plaintiff, deceased must have been killed while pursuing his intention to purchase goods and inspecting the goods; that the defendant's negligence proximately caused the injury; that there could be no recovery if deceased's negligence solely caused the injury, or if deceased was injured in a place to which he was not invited, or if a reasonable man would not have anticipated that deceased would go where he did; that the burden of proof was on plaintiff to show lack of reasonable care; that damages should be reduced in proportion to contributory negligence; and that, if the jury were unable to find with certainty whether negligence of deceased or of defendant caused the death, they should find for defendant. *Kress v. Markline* (Miss.) 1918E-310. (Annotated)

6. Question for jury.—Where store employees operated an elevator negligently for two years, by leaving the shaft door open, it is a question for the jury, in action for a customer's death by falling down the shaft, whether the storekeeper was negligent in failing properly to guard the shaft. *Kress v. Markline* (Miss.) 1918E-310. (Annotated)

EMBEZZLEMENT.

Lien of building and loan association for amount embezzled by member while secretary, see BUILDING AND LOAN ASSOCIATIONS, 4-8.

1. Indictment—Date of offense.—While, in an indictment for the statutory crime of embezzlement, a date must be named for the commission of the offense, yet, when time is not material, it need not be proved as laid, but commission of the crime on some date before the finding of the indictment, and within the statute of limitations, must be shown. *State v. Davis* (R. I.) 1918C-563.

2. Bill of particulars.—In trial for embezzlement, where the indictment charges the offense in general terms, it is proper for the court to order a bill of particulars. *State v. Davis* (R. I.) 1918C-563.

3. Under Gen. Laws 1909, c. 345, § 16, defining and penalizing embezzlement, and Gen. Laws 1909, c. 350, § 2, defining and penaliz-

ing an accessory before the fact, where a part of accused's indictment as accessory consisted of the principal's indictment drawn under Gen. Laws 1909, c. 345, § 18, containing allegations of the necessary elements of the offense, stating the value of the property and the time and place of embezzlement, but not specifying any of the particulars thereof, accused was not deprived of any right under Const. art. 1, § 10, "to be informed of the nature and cause of the accusation against him," although said section 18 permits at the trial the giving of evidence of all embezzlements committed within six months next after the time stated in the indictment as constituting a single offense, and although ordering a bill of particulars under such indictment is committed to the discretion of the trial court. *State v. Davis* (R. I.) 1918C-563.

EMINENT DOMAIN.

1. In General, 91.
2. Who May Exercise Power, 92.
3. Uses for Which Property May Be Taken, 92.
4. What Constitutes Taking, 92.
5. Compensation, 92.
6. Condemnation Proceedings, 92.

Compensation to railroad company in proceeding to compel common user of bridge, see RAILROADS, 8-13.

Municipality as party to condemnation proceedings as affecting right to change of venue because of prejudice or interest, see VENUE, 2-4.

1. In General.

1. Strict compliance with requirements.—The right of eminent domain belongs to the sovereign power, and statutes delegating authority to exercise it must be strictly construed. When it is sought to take the property of an individual under statutes granting such authority to corporations, subject to conditions specifically set forth, the protection of the constitutional guaranty of the right of private property requires that the powers granted by the legislature be strictly pursued and all of the prescribed conditions be performed. *Parkside Cemetery Assoc. v. Cleveland, etc., Traction Co.* (Ohio) 1918C-1051.

2. In a proceeding by a railroad company to appropriate land for its use, it is incumbent on the company to prove its incorporation according to law, including the due and legal election of directors, its right to make the appropriation, its inability to agree with the owners and the necessity for the appropriation. By the provisions of section 11046, General Code, the determination by the court of those questions favorably to the company is made jurisdictional. *Parkside Cemetery Assoc. v. Cleveland, etc., Traction Co.* (Ohio) 1918C-1051. (Annotated)

2. Who May Exercise Power.

3. "Dummy" corporation.—Section 8759, General Code, authorizes a railroad company to appropriate land deemed necessary for its railroad, including necessary sidetracks, etc. There is no authority for a railroad company to appropriate land in which it does not intend to have any real or beneficial interest or use, but which it is attempting as a "dummy" corporation to appropriate for the sole use and benefit of another company. *Parkside Cemetery Assoc. v. Cleveland, etc., Traction Co. (Ohio)* 1918C-1051.

4. Municipality.—Under the charter of the city of St. Paul, the council may condemn and take land and structures thereon, or as much thereof as may be necessary for the purposes of the improvement. *Sullnold v. St. Paul (Minn.)* 1918E-835.

3. Uses for Which Property May Be Taken.

5. Public library.—Under Act March 26, 1903 (P. L. 63), as amended by Act March 14, 1907 (P. L. 12), authorizing the city of Philadelphia to condemn real estate for necessary "municipal buildings," fire engine houses, gas or electric works, and hospitals, and also for land to construct workhouses, houses of detention, etc., and sewage disposal plants, the city is without authority to condemn land for a public library; a public library not being a necessary "municipal building." *Philadelphia's Petition (Pa.)* 1918E-120.

(Annotated)

6. Railroad sidetrack.—Where a sidetrack becomes a part of the trackage of a railroad to be operated as a part of its railway system, the taking of property therefor is a taking for a public purpose. *Ochs v. Chicago, etc., R. Co. (Minn.)* 1918E-337.

4. What Constitutes Taking of Property.

7. Public lavatory in street.—Under a statute giving a right to compensation where land is "injuriously affected" by the exercise of the power of eminent domain, an owner of land abutting on a street is entitled to compensation for the depreciation in the value thereof from the construction by the municipality of a public lavatory in the street. *Toronto v. J. F. Brown Co. (Can.)* 1918D-888.

(Annotated)

5. Compensation.

8. Taking for military camp.—Where the United States, which has taken possession of Alabama land for a military camp, thereafter begins condemnation proceedings under Act July 2, 1917, c. 35, 40 Stat. 241 (Fed. St. Ann. Pamph. Supp. No. 12, p. 112), which makes the state laws applicable, the owners are entitled to recover as compensation the value of the property at the time of the actual taking, together with interest at the legal rate fixed by the state on the amount fixed, which should include the value of growing crops, as well as diminution in the value of other lands of the owners contiguous to

those appropriated. *U. S. v. First Nat. Bank (U. S.)* 1918E-36.

(Annotated)

9. Where the landowner receives fair, reasonable, adequate, and just compensation for the condemnation of his land, the constitutional guaranties are satisfied, for it is not intended that the compensation shall extend beyond the loss or injury. *U. S. v. First Nat. Bank (U. S.)* 1918E-36.

10. Valuation of lands.—Under the Alabama Laws (Code 1907, §§ 3860, 3887), a landowner, whose property is condemned for a public purpose, is entitled only to "just compensation," which means equitable compensation, and is confined to the present value of the land. *U. S. v. First Nat. Bank (U. S.)* 1918E-36.

11. Adaptability to particular purpose.—Where lands are condemned, the owner is entitled to compensation on the basis of the value of the land for the purposes to which it might have been applied, having regard to the existing business conditions in the community, and not simply with reference to the productiveness in the condition in which the owner saw fit to leave it. *U. S. v. First Nat. Bank (U. S.)* 1918E-36.

12. Duty to minimize damage.—Where lands are condemned and growing crops destroyed, it is the duty of the owner, if he has the opportunity, to care for such perishable property and minimize the damages as far as reasonably possible. *U. S. v. First Nat. Bank (U. S.)* 1918E-36.

13. Valuation for taxation as evidence of value.—In assessing damages for the condemnation of land, the commissioners may consider the value at which the owner has assessed the land for taxation; but such assessment is not conclusive. *U. S. v. First Nat. Bank (U. S.)* 1918E-36.

14. Offsetting enhancement of other property.—Where the government takes possession of lands for a military reservation before condemnation proceedings, enhancement in value of the remaining lands cannot be offset against the value of that taken, but the owners are not entitled to receive any increased valuation on account of improvements made or proposed to be made by the government. *U. S. v. First Nat. Bank (U. S.)* 1918E-36.

6. Condemnation Proceedings.

15. Discontinuance by condemnor.—A water company, organized under Priv. & Sp. Laws 1895, c. 125, § 4, as amended by Priv. & Sp. Laws 1911, c. 256, § 4, requiring it to pay damages for taking of lands to be ascertained in the manner prescribed by law, in case of damage by laying out highways, cannot, under Rev. St. 1903, c. 23, § 7, postponing payment of damages until the actual taking possession of the land in highway cases, abandon the proceeding of condemnation, the provision of Act 1911 providing only the tribunal and method of procedure in ascertaining damage. *York Shore Water Co. v. Card (Me.)* 1918D-945.

(Annotated)

16. A water company having begun proceedings to condemn land for its site, an

award of damages having been made and confirmed, without appeal therefrom, cannot thereafter abandon the proceedings, the property owner having acquired a vested interest in the award. *York Shore Water Co. v. Card* (Me.) 1918D-945. (Annotated)

EMPLOYERS.

See MASTER AND SERVANT.

EMPLOYERS' LIABILITY ACTS.

See MASTER AND SERVANT, 4, 5, 35-38.

EMPLOYERS' LIABILITY INSURANCE.

See INSURANCE, 30-38.

ENACTMENT.

Of statutes, see STATUTES, 4-6.

ENCUMBRANCES.

Covenant against, see DEEDS, 11, 12.

ENDLESS CHAIN.

Relief of party to endless chain contract, see CONTRACTS, 20.

ENEMY.

Alien enemies, see ALIENS, 1-7.

ENTIRETIES.

Estate by entireties as subject to execution, see EXECUTIONS, 1.

EQUIPMENT.

Lack of statutory equipment of automobile, see AUTOMOBILES, 23.

EQUITY.

Equitable relief to corporate stockholders, see CORPORATIONS, 15-17.

Power of court of equity to change or modify trust, see TRUSTS AND TRUSTEES, 35-38.

Protection of minority stockholder, see CORPORATIONS, 42.

Suit in equity to prevent diversion of park to improper use, see PARKS AND SQUARES, 1.

1. Answer taken as true.—Where complainant, within the time allowed by law for taking testimony, sets down the cause for

hearing on bill and answer, the answer is, under Code 1906, § 603, to be taken as true. *New Standard Club v. McRaven* (Miss.) 1918E-274.

2. Right to dismiss bill where cross bill filed.—An order permitting the voluntary dismissal of plaintiff's bill before trial as of course, not referring to a cross bill of defendant, is not reversible error, where no probable legal prejudice therefrom to defendant's rights appears; such order not carrying with it the cross bill, which still remains to be disposed of if any affirmative relief is sought thereby. *Hyde Park Lumber Co. v. Hunt* (Vt.) 1918E-1183. (Annotated)

3. Relevancy of supplemental bill.—Plaintiff and defendant agreed in writing for rescission of a contract to sell land and for an arbitration of the amount defendant should pay plaintiff as reimbursement for payments on the purchase price and improvements, after deducting rents. What purported to be an award of the arbitrators was filed with the register, but the court refused to enter it as its decree, there being no preliminary order authorizing it. Plaintiff thereupon filed a supplemental bill setting up the agreement and award as a common-law arbitration, and prayed the court to put it into effect by its final decree in the cause. It is held that the supplemental bill proceeded upon the same equity as the original bill, and was properly allowed as a continuation thereof. *Black v. Woodruff* (Ala.) 1918C-969.

ERROR.

See APPEAL AND ERROR.

ESTATES.

See DEEDS; DOWER; EASEMENTS; LIFE ESTATES; REMAINDERS AND REVERSIONS; TRUSTS AND TRUSTEES; WILLS.

ESTOPPEL.

Of building and loan association to claim lien on stock of members, see BUILDING AND LOAN ASSOCIATIONS, 8.

Of carrier to collect rate different from that stated in bill of lading, see CARRIERS OF GOODS, 10.

Of factor to attack title of consignor, see FACTORS, 1-3.

Of lessor to deny insurable interest of lessee, see FIRE INSURANCE, 3.

Of wife to deny validity of contract of employment of attorney by husband, see ATTORNEYS, 2.

To attack award of arbitrators, see ARBITRATION AND AWARD, 6.

To declare forfeiture of membership in beneficial association, see BENEFICIAL ASSOCIATIONS, 16.

To deny corporate existence, see CORPORATIONS, 3.

- To deny title of husband, see **HUSBAND AND WIFE**, 23.
 To dispute authority of court to grant continuance, see **APPEAL AND ERROR**, 59.
 To enforce civil liability of corporate officers, see **CORPORATIONS**, 10.

1. Proof of facts creating.—An estoppel in pais may not be predicated on a possible inference. *Jewell v. Nuhn* (Ia.) 1918D-356.

2. Inconsistent position in litigation.—Where the widow of a railroad employee killed in service, suing for his death under Code 1906, § 721, as his lawful widow, asks for the usual instruction that she was entitled to recover such damages as the jury might determine, "taking into consideration all the damages to the decedent and all damages of every kind to any and all parties interested in this suit," she concedes the legitimacy of the children of decedent by his former marriage by seeking to enlarge her recovery on their account, and cannot deny their right to an undivided interest in the proceeds of the suit on the ground that they are illegitimate; their right to the fund being based on their judgment against the road, and not on the judgment alone recovered by the widow. *Howard v. Kelly* (Miss.) 1918E-1230.

EVICTIION.

Failure to furnish heat as constructive eviction, see **LANDLORD AND TENANT**, 18.

EVIDENCE.

1. Judicial Notice, 94.
2. Relevancy and Admissibility in General, 95.
3. Hearsay Evidence, 95.
4. Experimental Evidence, 95.
5. Expert and Opinion Evidence:
 - a. Expert Evidence, 95.
 - b. Nonexpert Opinion, 95.
6. Documentary Evidence, 96.
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8. Parol Evidence to Vary Written Instruments, 96.
9. Presumptions, 97.
10. Burden of Proof, 97.
11. Weight and Sufficiency of Evidence, 98.
12. Legislative Power over Rules of Evidence, 98.

See **ADMISSIONS AND DECLARATIONS**; **APPEAL AND ERROR**; **CRIMINAL LAW**; **DEPOSITIONS**; **DYING DECLARATIONS**; **WITNESSES**.

As to capacity of testator, see **WILLS**, 6-8.

As to revocation of will, see **WILLS**, 14-16.

Conformity of instructions to evidence, see **INSTRUCTIONS**, 7-10.

Credibility, impeachment and corroboration of witnesses, see **WITNESSES**, 13-18.

Examination of witnesses, see **WITNESSES**, 8-12.

In aid of construction of wills, see **WILLS**, 29-34.

Incorporating in record on appeal, see **APPEAL AND ERROR**, 16, 18-21, 28, 29.

In probate of wills, see **WILLS**, 18-21.

In proceeding against railroad to compel common user of bridge, see **RAILROADS**, 10, 11.

In suit to cancel deed to school lands purchased from state, see **Public Lands**, 19, 20.

In suit to set aside award, see **ARBITRATION AND AWARD**, 7-9.

Newly discovered evidence as ground for new trial, see **NEW TRIAL**, 4.

Objections, see **APPEAL AND ERROR**, 97.

Of foreign judgment, see **CONFLICT OF LAWS**, 5.

Of undue influence of testator, see **WILLS**, 9.

Parol evidence to establish trust, see **TRUSTS AND TRUSTEES**, 7-13.

Parol evidence to vary release, see **RELEASE AND DISCHARGE**, 8.

Prejudicial errors in relation to evidence, see **APPEAL AND ERROR**, 70-82.

Particular actions and actions by and against particular persons, and for particular causes—

See **AGENCY**, 7, 11, 14; **AUTOMOBILES**, 4, 6-9, 11, 18; **BROKERS**, 7, 8; **CARRIERS OF GOODS**, 16-19; **CONSPIRACY**, 1, 2; **CORPORATIONS**, 11-14, 17; **CRIMINAL LAW**, 14-21; **DAMAGES**, 4; **DEATH**, 1; **DEATH BY WRONGFUL ACT**, 10-16, 19; **DEED**, 14; **DISMISSAL AND NONSUIT**, 2, 3; **DYING DECLARATIONS**; **ELECTRICITY**, 11; **ELEVATORS**, 2-4; **FALSE PRETENSES**, 3, 4; **FIRE INSURANCE**, 18-20; **FOOD**, 2-4; **FORMER JEOPARDY**, 2; **FRAUD**, 7-9, 14, 15; **GUARANTY**, 5; **HOMICIDE**, 4-11; **HUSBAND AND WIFE**, 19, 20; **INDEPENDENT CONTRACTORS**, 6; **INJUNCTIONS**, 19, 20; **INTOXICATING LIQUORS**, 10-16; **LIBEL AND SLANDER**, 48-54; **LIFE INSURANCE**, 12-17; **LOST INSTRUMENTS**, 2-5; **MARRIAGE**, 6-8; **MASTER AND SERVANT**, 33, 34, 38; **MINES AND MINERALS**, 2; **MUNICIPAL CORPORATIONS**, 34; **NEGLIGENCE**, 6-8; **PHYSICIANS AND SURGEONS**, 7, 8, 13, 14; **RAILROADS**, 22; **RESCISSION, CANCELLATION AND REFORMATION**, 12; **TELEGRAPHS AND TELEPHONES**, 5, 12; **THEATERS AND AMUSEMENTS**, 10-11; **VENDOR AND PURCHASER**, 21-22; **WARRANTY**, 3; **WATERWORKS AND WATER COMPANIES**, 7-10; **WEAPONS**, 3.

1. Judicial Notice.

1. Fact of unexplained explosions.—The court may take judicial notice of the fact that disastrous explosions have occurred for which no satisfactory explanations have ever been offered. *Pierce Oil Corp. v. Hope* (Ark.) 1918E-143.

2. Tendency of metal to attract lightning.—It is not a known law of nature of which the court may take judicial notice that metals such as iron and steel possess properties

which perceptibly attract lightning and enhance the danger from lightning within the sphere of their influence. *Wiggins v. Industrial Acc. Board (Mont.)* 1918E-1164.

3. Rules of court.—The rules of a municipal court can be taken cognizance of on an appeal to the supreme court only when they are included in a bill of exceptions. *Seovill Mfg. Co. v. Cassidy (Ill.)* 1918E-602.

4. Mortality tables.—In the absence of evidence going to establish the probable duration of life or expectancy of one whose death resulted from the negligent act of another, the court may take judicial notice of any standard mortality tables and instruct the jury as to the facts stated therein. While the statute makes the Carlisle Mortality Tables admissible as evidence of such fact, it does not preclude the court from taking judicial notice of such tables as are generally used to establish life expectancy. *Chambers v. Minneapolis, etc. R. Co. (N. D.)* 1918C-954.

5. Labor conditions of women.—It is a matter of common knowledge, of which the court will take judicial notice, that conditions have arisen with reference to the employment of women which have made it necessary for many of the states to appoint commissions to make a detailed investigation of the subject of women's work and their wages. *State v. Crowe (Ark.)* 1918D-460.

2. Relevancy and Admissibility in General.

6. Showing dangerous character of place by previous accidents.—In action for death of customer by falling down elevator shaft in store, evidence that the elevator door had on former occasions been left open, and other people had nearly been hurt, is admissible as tending to show the dangerous character of the place. *Kress v. Markline (Miss.)* 1918E-310.

7. Proving value.—Evidence of a dealer in automobiles at the county seat, only a few miles from the town in which the cause of action arose, as to the value of a certain kind of automobile, is admissible; the price of such a common article of trade varying only as to freight charges in such a restricted territory. *Smead v. Stearns (Ia.)* 1918C-745.

8. As to matter of law.—Evidence as to the legal effect upon the title of the delivery of the bill of lading to the buyer, and of provision for the weighing and analyzing of the fertilizer, being purely questions of law, is properly excluded. *Agri Mfg. Co. v. Atlantic Fertilizer Co. (Md.)* 1918D-396.

3. Hearsay Evidence.

9. Testimony of deceased witness.—Where a witness who testified at a former trial has since died, his testimony may be reproduced on proof of his death. *McCue v. State (Tex.)* 1918C-674.

4. Experimental Evidence.

10. Speed of train.—In an action for in-

juries sustained while riding in the automobile of defendant's intestate, when he attempted to pass in front of an approaching train, the engineer testified that the train was running eight or ten miles an hour, that this was the usual speed at that crossing, and that it was necessary not to run at a greater speed in order to stop at a nearby station. A civil engineer was asked if he had timed a train making the ordinary stop at that station to know whether it could make its ordinary stop at a rate of more than ten miles an hour on the crossing. It is held that the exclusion of this question was not error, as it could only have contradicted the engineer's opinion as to the necessary limit of speed in order to make the stop, which was immaterial, and moreover the attempt to pass in front of the train would have been equally reprehensible whether the train was running ten miles an hour or faster. *Avery v. Thompson (Me.)* 1918E-1122.

11. The experimental observation which the witness was asked to narrate having been made at a subsequent date, and not confined to the particular train, is within the excluding rule of *res inter alios acta*. *Avery v. Thompson (Me.)* 1918E-1122.

5. Expert and Opinion Evidence.

a. Expert Evidence.

12. Another opinion as basis.—It is not proper to predicate an expert opinion upon another, as they must be based either upon facts or facts assumed to be true. *Hays v. Hogan (Mo.)* 1918E-1127.

13. Ultimate question for jury.—In a will contest, it is not error to sustain objections to questions of a physician as to whether one in the stages of senile dementia would have capacity to know the natural objects of his bounty. *Walsh's Estate (Mich.)* 1918E-217.

14. Operation of X-ray machine.—One qualified to testify as an expert in the use of X-ray machines may, from the result produced, give his opinion whether the machine was operated in a proper manner. *Holt v. Ten Broeck (Minn.)* 1918E-256.

b. Nonexpert Opinion.

15. Capacity of testator.—Since sanity is normal, it is not error in a will contest to admit opinion evidence of one who has transacted business with testator that testator seemed to have capacity to attend to his business affairs. *Walsh's Estate (Mich.)* 1918E-217.

16. Facts incapable of statement.—Where the truth must ultimately rest in inference or opinion, and it is impossible by description to reproduce the things seen by the witness so as to enable jurors to comprehend them as they are comprehended by one who has had the benefit of personal observation, it is proper to receive opinion evidence. An opinion of one who saw marks on plaintiff's thumb that the marks were teeth marks or were caused by a bite, held admis-

sible within this rule. *Patterson v. Blatti* (Minn.) 1918D-63.

6. Documentary Evidence.

17. Proof of foreign will.—Under Shannon's Code, § 3914, providing that wills executed in other states, etc., shall be proved according to the laws of this state, and certified in the manner prescribed by Act Cong. May 26, 1790, c. 11, 1 Stat. 122 (U. S. Comp. St. 1913, § 1519), and section 3915, providing that a copy of a will so certified shall be registered in the county where the land lies, and a copy from the books of the register, duly certified, shall be evidence, a certified copy of a foreign will of one of plaintiffs' predecessors in title which was probated by the proper officer in the foreign state, and a duly certified copy of which, with the certificate of probate, was recorded in Tennessee, is admissible. *Fielder v. Pemberton* (Tenn.) 1918E-905.

18. Under Shannon's Code, § 3914, providing that a foreign will shall be proved according to the laws of this state, and section 3904, providing that a will not contested may be proved by one of the subscribing witnesses, a certified copy of a foreign will, proved by only one witness, is admissible. *Fielder v. Pemberton* (Tenn.) 1918E-905.

19. A certified copy of a foreign will, setting forth the entire will verbatim, the affidavit of subscribing witness, oath and qualification of executor, and certificate of surrogate that above constituted the will and probate thereof, upon which letters testamentary issued to the executor, sufficiently shows the probate of the will. *Fielder v. Pemberton* (Tenn.) 1918E-905.

20. Proof of ancient deed.—A certified copy of an ancient deed, which had been on record for more than thirty years, without the slightest suspicion or question, was admissible, and had the same probative value as proof of recitals as the original would have had if produced. *Fielder v. Pemberton* (Tenn.) 1918E-905.

21. Record of marriage license.—The record of a marriage license issued to insured, stating he was over twenty-one, is admissible on the issue of his age, it having been the recorder's duty under a statute not to issue a license to him if under that age, except on consent of another, and to state in the license whether he was of age, and, if not, the name of the person consenting. *Armstrong v. Modern Woodmen of America* (Wash.) 1918E-263.

(Annotated)

22. Physician's death certificate.—In an action against a fraternal benefit insurance association, that part of the death certificate of the physician who attended decedent in her last illness, which, after stating that the death was caused by peritonitis, went on to state the contributory cause thereof was abortion, was not inadmissible as hearsay, although the remainder of the certificate reading, "said by decedent to have been performed by Dr. ———," was properly excluded, since a fair interpretation of the cer-

tificate was that the contributing cause of death is primarily within the knowledge of the physician, and is not hearsay. *Gilchrist v. Mystic Workers, etc.* (Mich.) 1918C-756.

(Annotated)

23. Account books.—Point one of the syllabus in *West Virginia Architects & Builders v. Stewart*, 68 W. Va. 506, reaffirmed and applied, as justifying the admissibility of plaintiff's books of account in evidence to the jury. *Parkersburg, etc. Sand Co. v. Smith* (W. Va.) 1918E-449.

7. Photographs as Evidence.

24. Common photograph.—Common photographs may be proved and used in evidence in the same manner as maps or other diagrams; and they may be verified either by the testimony of the person who took them or by the testimony of others who can state that the object sought to be shown is fairly represented thereby. *Davis v. Dunn* (Vt.) 1918D-994.

25. Photographs of the plaintiff's arm, properly identified, are admissible to prove identity of other photographs showing a fracture, on which the plaintiff relied, by showing a peculiar formation not usual in the arms of others. *Davis v. Dunn* (Vt.) 1918D-994.

26. X-ray photograph.—While under P. S. 1596, a party has the right to examine the adverse party, he cannot examine him as to an X-ray photographic plate not verified or authenticated by some evidence other than itself, since it is inadmissible as evidence until identified. *Davis v. Dunn* (Vt.) 1918D-994.

(Annotated)

27. Comparison of X-ray and common photograph.—Where the plaintiff sought to show malpractice by X-ray photographs of her arm, it was not error to exclude photographs of an alleged normal arm, not material to the case, but which would have raised collateral issues, and was of an experiment outside the case; admission of such evidence being within the discretion of the court. *Davis v. Dunn* (Vt.) 1918D-994.

8. Parol Evidence to Vary Written Instruments.

28. Where a stock subscription contract recites that the subscribers each agree to pay for the number of shares of stock set opposite their names, parol evidence of an agreement that no assessment would ever be levied on the unpaid stock, and that they would never be required to pay any more than what they had already paid, is inadmissible. *Bergman v. Evans* (Wash.) 1918C-849.

(Annotated)

29. Where a sale contract provides that the buyer may have each shipment analyzed before accepting it, evidence of a trade custom, that such provision will not prevent title passing, is inadmissible. *Agri Mfg. Co. v. Atlantic Fertilizer Co.* (Md.) 1918D-396.

30. Parol evidence to explain writing.—The rule excluding evidence of an independent, contemporaneous, oral agreement relat-

ing to the subject of a written contract inconsistent with the terms of the latter, does not conflict with the rule permitting evidence relating to the subject-matter with which the parties dealt and the object they sought to accomplish as shown by preceding negotiations, not to vary the contract, but to aid in its construction and make plain in what sense the parties used the language. *Chaplin v. Griffin* (Pa.) 1918C-787.

31. Where a written contract between a trustee and eight stockholders recites the ownership of the shares which are then in the name of the trustee, but does not indicate that they are owned in other than equal amounts by the parties, and authorizes the trustee to pledge the stock for a loan until a majority shall decide to dissolve the pool and provides that the owners shall take up their pro rata shares of the loan and pay the amount due on the stock when the pool shall be dissolved, in an action by the trustee against one of the eight members after dissolution of the pool for one-eighth of the loan, an affidavit of defense, setting up a parol understanding that the pro rata liability was to be based on the number of shares in the company which each of the parties owned, and defendant owned less than one-eighth of the shares, and averring tender of plaintiff's share, is sufficient as against a rule for judgment. *Chaplin v. Griffin* (Pa.) 1918C-787.

32. Showing intent from surrounding circumstances.—While an option timber contract speaks for itself and cannot be varied by parol evidence as far as its contents are concerned, where it is silent as to the time when the purchaser was to commence to cut the timber, the circumstances surrounding the parties at the time it was made can be detailed, and anything that took place at that time which would tend to show what the parties intended as to the time in which the cutting was to commence would be competent to be considered for what it was worth. *Berry v. Marion County Lumber Co.* (S. C.) 1918E-877.

33. Impeachment of conveyance.—Testimony of a witness of statements of grantor six years after making deed that the deed was not to give title is incompetent; for parol testimony as to a declaration of the grantor cannot invalidate his prior conveyance. *Campbell v. Sigmon* (N. C.) 1918C-40.

34. Contradicting recitals of deed.—Testimony of a witness as to statements of a grantor one or two weeks prior to the making of the deed that he was trying to get the grantee away from his home and tried to fix a plan to do so is inadmissible to contradict the recital of consideration in the deed. *Campbell v. Sigmon* (N. C.) 1918C-40.

35. Showing relation of parties to obligation.—In an action by a surety for contribution from an alleged cosurety, parol evidence may be admitted to show the actual relation of the parties to the obligation discharged by plaintiff. *Frew v. Scoular* (Neb.) 1918E-511.

Ann. Cas. Dig. 1918C-E.—7.

9. Presumptions.

- As to due care by person killed by falling down elevator shaft, see *ELEVATORS*, 2, 3.
- As to findings in certiorari proceeding, see *CERTIORARI*, 1.
- As to negotiability of lost note, see *LOST INSTRUMENTS*, 4.
- As to validity of ordinance, see *MUNICIPAL CORPORATIONS*, 14, 15.
- Creating presumption of survivorship by will, see *WILLS*, 39, 40, 48.
- Defects curable by conclusive evidence clause in statute, see *STATUTES*, 17, 18.
- Driving on wrong side of street as presumptive evidence of negligence, see *STREETS AND HIGHWAYS*, 9.
- Effect of presumption of death in action on life insurance policy, see *LIFE INSURANCE*, 17.
- From destruction of duplicate of will, see *WILLS*, 12.
- From failure to find will, see *WILLS*, 13.
- In action for death by wrongful act, as to degree of care used by intestate, see *DEATH BY WRONGFUL ACT*, 10, 11.
- In favor of award of compensation for user of bridge owned by railroad, see *RAILROADS*, 13.
- In favor of common-law marriage, see *MARRIAGE*, 8.
- In favor of validity of statutes, see *CONSTITUTIONAL LAW*, 28-30.
- Of conveyance as sale, see *MORTGAGES*, 14, 15.
- Of death, see *DEATH*, 1.
- Of injury to goods on line of terminal carrier, see *CARRIERS OF GOODS*, 11.
- On appeal, see *APPEAL AND ERROR*, 67-69.
- Validity of subsequent marriage, see *MARRIAGE*, 6, 7.
- Vesting of title in consignee on delivery of goods to carrier, see *CARRIERS OF GOODS*, 14.

36. Presumption based on presumption.—A presumption must be based on a fact, and not upon inference or upon another presumption. *Hays v. Hogan* (Mo.) 1918E-1127.

37. Continuance of meretricious relationship.—A meretricious relationship between a man and woman is presumed to have continued until the adulterous cohabitation changed from an unlawful to a lawful relationship. *Howard v. Kelly* (Miss.) 1918E-1230.

38. Receipt of letter.—The presumption that a properly mailed letter will, in the due course of mail, reach the person to whom it is addressed has application only where the act of mailing is unquestioned or conclusively shown. *Suits v. Order of United Commercial Travelers* (Minn.) 1918E-508.
(Annotated)

10. Burden of Proof.

39. How determined.—The question of where the burden of proof rests must be determined by the trial court upon the pleadings, and before the introduction of any evidence. *McClintock v. McClure* (Ky.) 1918E-96.

11. Weight and Sufficiency of Evidence.

40. Weight of uncontradicted testimony.—Where a witness on such trial testified that he saw the chauffeur stop a few feet short of the track before going upon it and then go on to the track, and that he saw the accident from his house, the supreme court cannot say that the testimony was unworthy of belief and should have been disregarded by the jury, who saw and heard the witness, on the ground that the witness' house was a quarter of a mile from the scene of the accident, where such distance can only be conjectured from a photograph of the surroundings and there was no other evidence of such distance. *Southern R. Co. v. Vaughan* (Va.) 1918D-842.

41. Proof of age.—Positive testimony of insured's having been born in a certain year, with detail by witness of facts and circumstances, lending support to his memory, is substantial evidence of such fact, preventing disturbance of refusal of new trial, asked on the ground of insufficient evidence of such fact. *Armstrong v. Modern Woodmen of America* (Wash.) 1918E-263.

42. Proof of receipt of letter.—The trial court did not err, upon the evidence stated in the opinion, in finding that a letter offered in evidence by defendant was not mailed to or received by the person to whom it was addressed. *Suits v. Order of United Commercial Travelers* (Minn.) 1918E-508.

(Annotated)

43. Impeaching evidence—Effect as affirmative proof.—Where a witness' testimony on a material point is contradicted by impeaching testimony of his statements made to witness at another time, such statements are available only for impeachment and not as affirmative evidence. *Moseley v. Goodman* (Tenn.) 1918C-931.

12. Legislative Power over Rules of Evidence.

44. Creating presumption of fact.—While the legislature may declare that certain evidentiary facts shall be prima facie evidence, such facts must have some direct and logical tendency to prove the antecedent fact, hence a municipal ordinance declaring that if any person shall alone, or in company with others, loiter or parade back and forth in front of or cause any other person or persons to loiter or parade back and forth in front of, or in the vicinity of, any store, factory, works, or place of business, or in front of, or in the vicinity of the home of any person connected with, employed in, or seeking employment in any such store, etc., such conduct shall be prima facie evidence of a conspiracy to injure the trade, business, or commerce of the proprietor of the store, etc., thus patrolled, is invalid, because the acts have no tendency to prove a conspiracy to injure the commerce or trade of any person. *Hall v. Johnson* (Ore.) 1918E-49.

EXAMINATION.

Of witnesses, see **WITNESSES**, 8-12.

EXCEPTIONS AND OBJECTIONS.

Bill of exceptions, see **APPEAL AND ERROR**, 24-29.

Necessity of exception or objection to raise question on appeal, see **APPEAL AND ERROR**, 89-93.

EXCHANGE OF PROPERTY.

Commission for procuring, see **BROKERS**, 3, 6-12.

Oral contract for payment of commission for exchange of personal property, for realty as within statute of frauds, see **FRAUDS**, **STATUTE OF**, 3.

Specific performance of contract for exchange of land, see **SPECIFIC PERFORMANCE**, 1.

EXECUTIONS.

See **ATTACHMENT**; **GARNISHMENT**.

Injunction against execution sale, see **INJUNCTION**, 5-9, 16, 17, 19, 20.

1. Property subject—Estate by entireties.—Under a trust deed conveying land for the benefit of the grantor and his wife for their lives, with a general power of disposition in the grantor, the estate of the grantor and his wife was an estate by entireties, and not subject to sale under execution. *Harris v. Carolina Distributing Co.* (N. C.) 1918C-329.

2. Exemptions—Construction of statute.—Since exemption statutes are remedial in character, they are given a liberal construction. *Childers v. Brown* (Ore.) 1918D-170.

3. Exemption of team.—Under L. O. L. § 227, as amended by Laws 1915, p. 27, exempting from execution a team, vehicle, harness, etc., necessary to enable anyone to carry on the occupation by which he habitually earns his living, the debtor may select and reserve a team, vehicle, and harness without being obliged to show that he has no other like property, or to point out other property to the sheriff, even though he owns additional property of the same kind, and the debtor, if owning more than two horses, may select any two. *Childers v. Brown* (Ore.) 1918D-170.

4. Under such statute, it is essential that the property should have been used exclusively to carry on the occupation by which one habitually earns his living, because an occasional use for other purposes will not defeat his right to exemption; and such right is not lost if the owner is not actually using the property in his occupation at the very time of the levy, or if temporarily, he is not engaged in his occupation, and is preserved if he honestly intends to use the property within a reasonable time to carry on his occupation. *Childers v. Brown* (Ore.) 1918D-170. (Annotated)

5. Under L. O. L. § 227, as amended by Laws 1915, p. 27, making the team, vehicle, harness, etc., necessary to enable any person to carry on the trade, occupation, or profes-

sion by which he habitually earns his living exempt from execution, the term "necessary" signifies "reasonably necessary" or "convenient" or "suitable," and does not mean "indispensable" or "absolutely necessary;" and, standing alone, the word "occupation" means the principal business of one's life, habitual or stated employment, vocation, calling, trade, the business in which one principally engages to secure a living, the employment by which he generally gets his living, and includes any employment in which a person is engaged to procure a living. *Childers v. Brown* (Ore.) 1918D-170.

(Annotated)

6. In replevin for a team, wagon, and harness attached by defendant sheriff, the taking of which was justified by his answer, a reply claiming an exemption and right to a return of the property under the statute (L. O. L. § 227, as amended by Laws 1915, p. 27), exempting from execution a team, vehicle, harness, etc., necessary to enable one to carry on the occupation by which he habitually earns his living, showing that the property was being used by plaintiff for the purpose of earning a living for the support of his family, and that it was the only property of the kind which he could use, and that it had been habitually used for that purpose, was sufficient after verdict. *Childers v. Brown* (Ore.) 1918D-170.

7. Waiver of exemption.—The right of exemption from execution is a privilege which may be waived by the consent of the debtor, or by his failure to assert his rights. *Childers v. Brown* (Ore.) 1918D-170.

8. Under L. O. L. § 227, as amended by Laws 1915, p. 27, exempting from execution a team, vehicle, harness, etc., necessary to enable one to carry on his occupation, if selected and reserved by the judgment debtor at the time of the levy or as soon thereafter before sale as it shall be known to him, a failure to select exempted property at the exact time of the levy, even though the debtor is present, will not alone operate as a waiver of his right, as the word "at," when used in reference to time, does not always mean the exact moment or day, but may express nearness and proximity, and consequently may denote a reasonable time, and as the words "as soon as" likewise have a restricted and an unrestricted signification; so that the debtor, if he acts before sale, may assert his right of exemption within a reasonable time after the levy becomes known to him, whether he was present or absent at the time of the seizure. *Childers v. Brown* (Ore.) 1918D-170.

9. Burden of showing exemption.—A sheriff's seizure on attachment cannot be avoided, unless the debtor alleges and proves a situation bringing the property within the exemption statute, and avers and establishes every fact essential to the exemption. *Childers v. Brown* (Ore.) 1918D-170.

2. Title to Estate, 100.

3. Assets of Estate, 100.

4. Rights and Liabilities, 100.

5. Sale of Decedent's Realty, 100.

6. Accounting, 100.

7. Distribution, 100.

See DESCENT AND DISTRIBUTION; WILLS.

Executor as trustee within rule that bar of statute against trustee bars right of cestui que trust, see LIMITATION OF ACTIONS, 3.

1. Appointment and Removal.

1. Right of executor to appointment.—Under Rev. St. 1909, §§ 14, 17, 19, 50, touching the granting of letters of administration to executors, providing who may not act as executors, and providing for the revocation of letters of administration for certain causes, the right to letters testamentary of a party named as executor in a will is absolute, unless other facts appear which preclude him from asserting his original right, and mandamus is a proper remedy to compel the probate court to grant such letters. *State v. Holtcamp* (Mo.) 1918D-454.

2. Renunciation of right.—One named as executor in a will, though having the absolute right to letters testamentary upon probate, if not disqualified by the statutes may renounce his rights by express renunciation or by acts and conduct in pais. *State v. Holtcamp* (Mo.) 1918D-454.

(Annotated)

3. Where the executor named in the will of an Ohio decedent, after qualifying as such in Ohio, resigned generally, not stating that he was resigning only in Ohio, and also resigned as director in the corporation in which the Missouri assets of the estate were principally invested, avowedly severing all his relations with the Missouri estate, writing a letter to testator's widow clearly indicating his intention to have nothing to do with the estate, and, though a resident in the city in Missouri where the property was located, taking no interest therein for three months, nor making any effort in Missouri to file the will or qualify thereunder, which was finally presented by another, the probate court is justified in finding that the executor had renounced his right to act as such in Missouri. *State v. Holtcamp* (Mo.) 1918D-454.

(Annotated)

4. The exercise of judicial discretion, such as the determination by the probate court of whether the executor named in a will has renounced in pais, cannot be controlled by mandamus. *State v. Holtcamp* (Mo.) 1918D-454.

(Annotated)

5. Effect as to ancillary jurisdiction.—An executor's renunciation or resignation in the domiciliary jurisdiction of testator terminates his right to act in other jurisdictions under ancillary letters. *State v. Holtcamp* (Mo.) 1918D-454.

(Annotated)

6. An executor named in the will of an Ohio decedent who resigned generally, after qualifying in Ohio, is not entitled to appointment as executor in Missouri after the

EXECUTORS AND ADMINISTRATORS.

1. Appointment and Removal, 99.

probate court, acting on his renunciation, has appointed an administrator in his stead. *State v. Holtcamp* (Mo.) 1918D-454.

(Annotated)

7. Resignation in ancillary jurisdiction.—The right of renouncement of a person named in a will as executor is available only in the tribunal of the testator's domicile, and, after an executor has qualified in such tribunal, his resignation in an ancillary jurisdiction is void. *State v. Holtcamp* (Mo.) 1918D-454.

(Annotated)

8. Appointment of administration after renunciation of executor.—The probate court, in appointing an administrator, after renunciation by the executor named as such in the will, must determine whether there has been a renunciation, in which matter it exercises a discretion and performs a judicial function. *State v. Holtcamp* (Mo.) 1918D-454.

(Annotated)

2. Title to Estate.

9. Under the statutory provisions and procedure relative to the estates of decedents, the title to real estate vests in the heirs and devisees at the moment of the death of the testator or intestate, subject only to the right of possession of the executor or administrator under Rev. Laws, § 5950, for the payment of the debts and expenses of administration, with the right in the administrator to possession until the estate is settled or delivered over to the parties entitled by the order of the probate court. *Wren v. Dixon* (Nev.) 1918D-1064.

10. Property outside jurisdiction.—An executor duly qualified in testator's domiciliary jurisdiction succeeds to title of all of testator's estate, whenever situated, and continues to hold such title until an ancillary executor is appointed in a foreign jurisdiction, when the title of the estate in the ancillary jurisdiction vests in the latter. *State v. Holtcamp* (Mo.) 1918D-454.

11. Action by heirs to recover realty.—Where an administrator or executor has been appointed, and the estate is in the course of probate, it is the right of the heirs to maintain an action as against third persons for the possession of the realty. *Wren v. Dixon* (Nev.) 1918D-1064.

3. Assets of Estate.

12. Money in hands of heirs.—The question of the obligation of one or more of the heirs of an estate to collate money paid to them, by consent of their coheirs, prior to the appointment of the executor, is one which the executor may leave to the heirs for settlement. *Pons's Succession* (La.) 1918D-939.

4. Rights and Liabilities.

13. False representation by agent.—An administrator selling his decedent's goods through an agent is liable for the acts of the agent done within the scope of his authority, including false representations made to the

buyers as to the condition and kind of the goods. *Harlow v. Perry* (Me.) 1918C-37.

5. Sale of Decedent's Realty.

14. Interest of widow.—Where a testator gives to his wife a life estate in all his property, a power of sale given to executors cannot be construed to deprive her of her life estate, or dispose of property without her joining in the deed. *Cross v. Buskirk-Rutledge Lumber Co.* (Tenn.) 1918D-983.

6. Accounting.

15. Persons entitled to object.—Where the accounts of executors, who paid certain taxes, were duly settled, testamentary trustees, who simply received the residue of the estate, have no right to request instructions on the propriety of such payments. *Parkhurst v. Ginn* (Mass.) 1918E-982.

7. Distribution.

16. Finality of decree.—After final distribution it must be presumed that the decree therefor was duly rendered, and such decree becomes final against one suing the executrix for accounting, claiming under an alleged unprobated codicil devising plaintiff money, unless facts alleged disclose fraud of the executrix in procuring the decree. *Davis v. Seavey* (Wash.) 1918D-314.

17. Ground for vacation.—That the executrix failed to present true facts as to who was entitled to property on final distribution hearing is no ground for setting aside a final decree rendered on due notice, being in effect a collateral attack. *Davis v. Seavey* (Wash.) 1918D-314.

18. To warrant setting aside decree for final distribution, rendered on due notice, fraud alleged on part of executrix must relate to preventing claimant from appearing and setting up her claim. *Davis v. Seavey* (Wash.) 1918D-314.

19. Where final decree of distribution under will is made, and beneficiary under an alleged unprobated codicil makes no claim or objection for over a year, such beneficiary has no standing under Rem. Code 1915, § 466, requiring petitions to vacate judgments to be served on the adverse party within one year. *Davis v. Seavey* (Wash.) 1918D-314.

(Annotated)

20. Under Rem. Code 1915, § 1307, providing for will contests within one year after probate or rejection, where final decree of distribution under will was made, and the beneficiary under an alleged unprobated codicil made no claim or objection for over a year, her suit for accounting was not a will contest, and she can have no relief although the existence of the codicil was concealed by the executrix. *Davis v. Seavey* (Wash.) 1918D-314.

(Annotated)

EXECUTORY DEVICES.

See REMAINDERS, 1, 2.

EXECUTORY LIMITATIONS.

Dower in lands subject to executory limitation, see DOWER, 1-3, 5.

EXEMPLARY DAMAGES.

See DAMAGES, 3.

EXEMPTIONS.

From execution, see EXECUTIONS, 2-9.
From inheritance taxes, see TAXATION, 55-58.
From taxation for special assessments, see TAXATION, 46.
From taxation generally, see TAXATION, 21-33.

EXHIBITS.

Incorporation of exhibits in record on appeal, see APPEAL AND ERROR, 19-21.
Necessity for attaching will as exhibit to deposition referring thereto, see DEPOSITIONS, 1.

EXPERIMENTAL EVIDENCE.

See EVIDENCE, 10, 11.

EXPERTS.

Expert evidence, see EVIDENCE, 12-14.

EXPLOSIONS AND EXPLOSIVES.

Judicial notice of fact of unexplained explosions, see EVIDENCE, 1.

1. Municipal regulation of storage.—A municipality is not estopped from passing an ordinance prohibiting keeping of gasoline, etc., in quantities, within 300 feet of a dwelling, etc., by having once required the tanks of an oil company in the municipality to be moved to an approved site, although such prior removal was attended with expense to the oil company. *Pierce Oil Corp. v. Hope* (Ark.) 1918E-143. (Annotated)

2. Such an ordinance is authorized by Kirby's Dig. §§ 5438, 5439, authorizing municipalities to regulate the keeping of combustibles, etc. *Pierce Oil Corp. v. Hope* (Ark.) 1918-143. (Annotated)

3. A municipality is not deprived of its power to ordain that gasoline, etc., shall be stored in a certain manner by the fact that oil companies affected have provided facilities which, if properly used, will render their tanks harmless; a municipality having the right to use its judgment as to the amount of risk involved. *Pierce Oil Corp. v. Hope* (Ark.) 1918E-143. (Annotated)

4. Leaving explosives accessible to infants.—It is actionable negligence to leave bombs or other explosives in a position where they

are liable to become exploded by children to their injury. *Sroka v. Halliday* (R. I.) 1918D-961.

5. Owner of business mining marl one-fourth of a mile from a station and town; who maintained an unlocked shed in which dynamite caps were stored, around which children were seen playing, and to which a path led from the road, was liable when a seven year old boy took dynamite caps from the shed and was injured by the explosion of one of them. *Krachanake v. Acme Mfg. Co.* (N. C.) 1918E-340.

EXPRESS COMPANIES.

Damages recoverable for delay in transportation of moving picture films, see CARRIERS OF GOODS, 21.
Liability for deviation from agreed method of transportation of horses, see CARRIERS OF LIVE STOCK, 1.

EXTENSION OF TIME.

As consideration for contract of suretyship, see SURETYSHIP, 2, 3.
As discharging accommodation maker, see BILLS AND NOTES, 1, 2.

EXTRADITION.

1. Trial for other offense.—Where a person is extradited to Canada from the United States on a charge of fraud by instigating the publication of a false statement in a certain newspaper and is convicted in Canada of the offense of fraud in concurring in the publication of the same false statement in another newspaper, the conviction should be quashed as being for an offense other than the one on which the warrant for extradition issued. *Buck v. The King* (Can.) 1918D-1023. (Annotated)

2. Person not in demanding state at time of offense.—Although the federal law does not provide for the surrender by a state as a fugitive from justice of one who has violated the criminal laws of another state without having been present therein, and although in the absence of state legislation no authority exists for such surrender, nevertheless, where, in the absence of any local statute, a person is surrendered by one state to another as a fugitive from justice, the fact that the accused had not been in the demanding state at the time of the alleged offense, or since then, does not deprive its courts of jurisdiction to try him therefor, nor does it show such an abuse of process as to warrant the dismissal of the case against him. *State v. Wellman* (Kan.) 1918D-1006. (Annotated)

FACTORS.

See BROKERS.

1. Right to deny title of consignor.—A factor or commission merchant is both a bailee and a sales agent, and is estopped from attacking the title of the consignor to the proceeds of property consigned to and sold by him until he has delivered such proceeds to the consignor. *Blackorby v. Friend* (Minn.) 1918E-1199. (Annotated)

2. There are various exceptions to the above rule, as where the bailee has yielded to a paramount title asserted by a third party without his connivance, or where a fraud is being perpetrated upon him. *Blackorby v. Friend* (Minn.) 1918E-1199.

(Annotated)

3. Defendant, a commission merchant, sold a carload of stock consigned to it by plaintiff and received the proceeds thereof which it refuses to deliver to plaintiff. The case is not within any of the exceptions to the above rule and defendant is estopped from denying plaintiff's title to such proceeds. *Blackorby v. Friend* (Minn.) 1918E-1196.

(Annotated)

FACTS.

Review of facts on appeal, see **APPEAL AND ERROR**, 43-57.

FAITH AND CREDIT.

Effect of foreign judgment against principal defendant, see **GARNISHMENT**, 3.
Of foreign judgment, see **CONFLICT OF LAWS**, 5.

FALSE PRETENSES.

1. Confidence game.—Under Cr. Code, § 98, declaring that anyone obtaining from another any money or property by use of any false or bogus check, instrument, or devise, commonly called the confidence game, shall be imprisoned, and § 99, providing an indictment charging that accused did unlawfully and feloniously obtain from a certain person his money or property by means and by use of the confidence game shall be sufficient, an indictment need not set out the acts constituting the offense. *People v. Brady* (Ill.) 1918C-540.

2. Under such provisions, together with Criminal Code, § 408, providing that every indictment shall be sufficient which states the offense in the terms and language of the statute creating the offense or so plainly that the nature of it may be understood by the jury, an indictment, charging the obtaining of property by means of the confidence game, without describing the property alleged to have been obtained, was sufficient, as the crime does not consist in the obtaining of any particular amount of money or property, but in obtaining money or property without reference to its kind. *People v. Brady* (Ill.) 1918C-540.

3. In such trial the testimony of a witness as to a precisely similar transaction between

himself and all the defendants, except one, is admissible. *People v. Brady* (Ill.) 1918C-540.

4. Evidence, in a trial on an indictment for obtaining money and property from a certain named person by means of the confidence game, is held to sustain a conviction. *People v. Brady* (Ill.) 1918C-540.

FARES.

See **CARRIERS OF PASSENGERS**.

FATHER.

See **PARENT AND CHILD**.

FEDERAL BOILER INSPECTION ACT.

See **MASTER AND SERVANT**, 4, 5.

FEDERAL EMPLOYERS' LIABILITY ACT.

Lien of attorney in action brought under act, see **ATTORNEYS**, 17.

FEDERAL HOURS OF SERVICE ACT.

Unavoidable accident causing delay as excusing violation, see **LABOR LAWS**, 1.

FEDERAL QUESTION.

Raising of federal question by assertion in opinion of appellate court, see **APPEAL AND ERROR**, 8.

FEDERAL RESERVE BANK ACT.

Validity and construction of act, see **BANKS AND BANKING**, 1-3.

FEES.

Constitutionality of statute requiring payment of fees by candidates, see **ELECTIONS**, 3.

FENCES.

Submission of proposition for adoption of fence law, see **ELECTIONS**, 15, 16.

1. Validity of county fence law.—Pub. Loc. Laws, c. 505, providing the method and amount of taxation for the construction of county fences, is invalid as in violation of Const. art. 7, § 9, providing that all taxes shall be uniform and ad valorem on all property except property exempted by the constitution, in that it attempts to exempt prop-

erty of natural persons. *Keith v. Lockhart* (N. C.) 1918D-916.

FERRIES.

1. Care required.—Ferryman, by reason of the nature of the franchise they exercise, and the character of the services they render to the public, are held to extreme diligence and care, and to a stringent liability for any neglect or omission of duty, which is the rule of reasonable care for ferryman, since the term is relative. *Meisle v. New York Cent. etc. R. Co.* (N. Y.) 1918E-1081. (Annotated)

2. Strict diligence and a due regard for the value of human life, required of a ferryman by the rule of reasonable care, do not make him an insurer of the safety of his passengers. *Meisle v. New York Cent. etc. R. Co.* (N. Y.) 1918E-1081. (Annotated)

3. It is not necessary that a railroad operating a steam ferryboat should have notice that failure to put up the chains on the ferryboat at the end of the boat will result in an accident, if the possibility of the accident is clear to the ordinarily prudent eye. *Meisle v. New York Cent. etc. R. Co.* (N. Y.) 1918E-1081. (Annotated)

4. Supervision of automobiles.—A ferryman, as part of his general duty to exercise reasonable care, is under duty to recognize that automobiles, while not inherently dangerous, may, from conditions of place and circumstances, become dangerous instrumentalities. *Meisle v. New York Cent. etc. R. Co.* (N. Y.) 1918E-1081. (Annotated)

5. It is the duty of a ferryman transporting automobiles to provide a practical barrier against the cars running forward and injuring a passenger, and to exercise reasonable supervision over the automobiles while on the ferryboat. *Meisle v. New York Cent. etc. R. Co.* (N. Y.) 1918E-1081. (Annotated)

6. Question for jury.—In an administrator's action against a railroad operating a steam ferryboat for death of her intestate by drowning when an automobile on the boat ran forward and knocked decedent into the river, defendant having interposed no obstacle to the progress of the car once it was started, the question of defendant's negligence is held to be for the jury. *Meisle v. New York Cent. etc. R. Co.* (N. Y.) 1918E-1081. (Annotated)

FILMS.

Damages for delay in transportation, see CARRIERS OF GOODS, 21.

FINAL JUDGMENT.

Finality of order of intermediate appellate court, see APPEAL AND ERROR, 9.

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Review of findings of court, see APPEAL AND ERROR, 49, 50.

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Necessity as to issue involving rights excluded by laches, see TRIAL, 11.

FIRE INSURANCE.

1. Insurable Interest, 103.

2. Construction of Policy:

a. In General, 103.

b. Particular Provisions:

(1) Sole and Unconditional Ownership, 104.

(2) Provision against Assignment, 104.

(3) Iron-safe Clause, 104.

(4) Provision against Keeping Certain Articles, 104.

3. Cancellation of Policy, 105.

4. Actions, 105.

See INSURANCE.

Validity of statute creating state insurance board and requiring fire insurance companies to file schedule of rates, see INSURANCE, 10.

1. Insurable Interest.

1. Any person has an insurable interest in property if he receives a benefit, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of, the property itself. *Plum Trees Lime Co. v. Keeler* (Conn.) 1918E-831.

2. Interest of lessee.—Where a quarry tenant has erected buildings at a cost of \$2,500 and has a lease which will run for eight years requiring it to keep the buildings and machinery in good repair, it has an insurable interest in the buildings. *Plum Trees Lime Co. v. Keeler* (Conn.) 1918E-831. (Annotated)

3. Estoppel of lessor to deny insurable interest of lessee.—Where the lease will expire in eight years and the tenant has built new buildings to make the premises tenantable and has taken out insurance which the insurer required to be in the landlord's name, and on loss the landlord collects the insurance after having refused to insure his own buildings, the value of plaintiff's buildings being greater than the amount of insurance, it is too late for the landlord to claim that the tenant had no legal or equitable right to recover the insurance money. *Plum Trees Lime Co. v. Keeler* (Conn.) 1918E-831. (Annotated)

2. Construction of Policy.

a. In General.

4. Ignorance of insured of terms of policy.—The neglect of the insured to become acquainted with the provisions of his fire insur-

ance policy which he seeks to enforce cannot relieve him of the binding effect of its covenants, in the absence of any evidence impeaching its validity. *Miller v. Home Ins. Co. (Md.) 1918E-384.*

5. **Misrepresentations.**—A fraudulent misrepresentation avoiding a fire insurance policy must have been knowingly false, have misled the insurer, and increased the risk. *Waller v. New York Ins. Co. (Ore.) 1918C-139.*

6. Defendant fire insurance company's allegations that plaintiff secured insurance on a house which defendant had previously refused to insure by misstating its name and location, is held to be insufficient where facts showing the materiality of such representations or the resulting damage to defendant were not stated. *Waller v. New York Ins. Co. (Ore.) 1918C-139.*

b. Particular Provisions.

(1) Sole and Unconditional Ownership.

7. A party in possession under a partly performed contract for the purchase of realty is the sole and unconditional owner in fee simple within the Oregon standard fire insurance policy. *Waller v. New York Ins. Co. (Ore.) 1918C-139.* (Annotated)

8. A fire insurance policy upon a building, containing a stipulation that the policy "shall be void . . . if the interest of the insured be other than unconditional and sole ownership," is not invalidated because of an outstanding naked legal title in another where the insured has the equitable title, the entire beneficial ownership of the property, and is in undisputed possession of the same. *Hankins v. Williamsburg City F. Ins. Co. (Kan.) 1918C-135.* (Annotated)

(2) Provision against Assignment.

9. A policy of fire insurance provided that it should become void if the property insured was "assigned" without the permission of the insurer, and further that any change material to the risk should avoid the policy unless the company was promptly notified thereof. The insured gave a bill of sale of the insured property as security for an indebtedness, retaining possession. It is held:

(1) The insured property was not "assigned" in violation of the provision of the policy by giving the bill of sale, which was in legal effect a chattel mortgage.

(2) Whether there was a change material to the risk was a question for the jury, and its finding thereon is sustained by the evidence. *King v. Hartford F. Ins. Co. (Minn.) 1918D-861.* (Annotated)

(3) Iron-safe Clause.

10. Where in an inventory taken under the terms of a policy of insurance providing that, "The assured will take an itemized inventory

of stock hereby insured, . . ." it appears that approximately one-ninth of a stock of merchandise covered by the policy was not invoiced in a proper or approved manner, in that some of the articles were set down in lots or groups, and not by items, but that the remainder of such stock was described therein item by item, with the value set opposite, held, that such deficiency did not pervade the whole inventory or constitute its controlling feature. Held, further, that inasmuch as the greater proportion of the stock, properly inventoried, amounted in value to approximately \$42,000, and recovery was had for but \$23,000, the inventory in the instant case substantially meets the requirements of the policy. *Hanover F. Ins. Co. v. Eisman (Okla.) 1918D-288.*

11. The provision of a policy of insurance that "the assured will keep a set of books, which shall clearly and plainly present a complete record of the business transacted, . . ." is substantially complied with by the assured keeping a set of books clearly showing such matters to men of ordinary intelligence. Evidence examined, and held sufficient to show a substantial compliance with such provisions. *Hanover F. Ins. Co. v. Eisman (Okla.) 1918D-288.*

12. Under covenants in a policy of fire insurance on a stock of merchandise that insured would take a complete inventory of stock on hand at least once a year, and unless such an inventory had been taken within a year, would take an inventory within thirty days of its issuance, insured, who on his purchase of the stock two weeks before the date of the policy makes a complete and itemized list of the various goods in the stock indicating the amount and value in detail as a basis for his purchase, makes an inventory within the policy, and within the accepted definition of "inventory" as an itemized list or schedule of articles, usually including a notation of their estimated values. *Miller v. Home Ins. Co. (Md.) 1918E-384.* (Annotated)

13. Where such inventory was made within the covenants of the policy, but the insured who was expressly required by the policy to keep a set of books during the continuance of the insurance and to keep them in a fire proof safe, failed to keep any books, his consequent inability to produce such books after the fire avoided the policy. *Miller v. Home Ins. Co. (Md.) 1918E-384.* (Annotated)

(4) Provision against Keeping Certain Articles.

14. "Storing" of gasoline.—Gasoline was not "stored," within the meaning of the terms of the policies of insurance involved, by keeping a small quantity thereof in a closed metallic container on the premises for the purpose of occasionally cleaning the wearing apparel of the assured; and the use of a candle in a room where such gasoline was found did not avoid the policy. *Hanover F. Ins. Co. v. Eisman (Okla.) 1918D-288.* (Annotated)

3. Cancellation of Policy.

15. **Sufficiency and effect of notice.**—Under Insurance Law (Consol. Laws, c. 28), § 122, providing that any insurer shall cancel any policy of insurance upon request of insured and return the amount of premium paid, less the customary short rate premium, notwithstanding anything in the policy to the contrary, a letter written by insured, stating that he wished to cancel a specified policy, to take effect at once, and asking the insurer to give the matter immediate attention, is a sufficient notice of cancellation to effect a cancellation; there being no merit in the contention that insured merely expressed a wish to cancel the policy, rather than a request for its cancellation, within the meaning of the statute. *Gately-Haire Co. v. Niagara F. Ins. Co. (N. Y.) 1918C-115.* (Annotated)

16. Under Insurance Law, § 122, and a provision of a fire insurance policy that the policy should be canceled at any time on request of insured, or by the company on five days' notice, and that, if the policy should be canceled, the unearned portion of the premium should be returned on surrender of the policy, the company retaining the customary short rate, a written request by insured for cancellation of a policy effects a cancellation, though the policy is not surrendered, and the unearned portion of the premium is not returned, as these are not conditions precedent to a cancellation. *Gately-Haire Co. v. Niagara F. Ins. Co. (N. Y.) 1918C-115.* (Annotated)

17. Under Insurance Law § 122, a written request by insured that a policy be canceled effects a cancellation at once, without any action by the insurer. *Gately-Haire Co. v. Niagara F. Ins. Co. (N. Y.) 1918C-115.* (Annotated)

4. Actions.

18. **Parol evidence to vary policy.**—The parol evidence rule in all its vigor applies to fire policies, and cannot be resorted to to vary the terms of the written policy save in case of latent ambiguity. *Connecticut F. Ins. Co. v. W. H. Roberts Lumber Co. (Va.) 1918E-1045.*

19. **Extent of loss—Profits.**—A fire policy, insuring lumber and staves owned or held in trust or commission by plaintiff, while stacked or piled at its various mill sets or yards or shipping points, does not extend to plaintiff's profits which might result from its handling of lumber. *Connecticut F. Ins. Co. v. W. H. Roberts Lumber Co. (Va.) 1918E-1045.* (Annotated)

20. A fire policy covering any interest plaintiff might have in lumber at the time of its destruction does not include profits; therefore, where an agent of the insurer and plaintiff agreed that the policy should cover any such interest, parol evidence showing that fact is not admissible to show that the policy included profits; there being no meeting of the minds of the parties on that question. *Connecticut F. Ins. Co. v. W. H. Roberts Lumber Co. (Va.) 1918E-1045.*

21. **Instructions.**—Instructions given and refused examined. Held, there was no prejudicial error therein. *Hanover F. Ins. Co. v. Eisman (Okla.) 1918D-238.*

FIRES.

Liability of railroad for damages for personal injuries caused by fire started by engine, see *RAILROADS*, 21, 22.

FIREWORKS.

Liability of committee having charge of display of fireworks for injuries to spectators, see *THEATERS AND AMUSEMENTS*, 5-12.

FIXTURES.

1. **Trade fixtures.**—What constitutes trade fixtures is a question of intention to annex, and not as to the character of the physical annexation to the realty, and is usually a mixed question of law and fact for the jury. *McClintock, etc. Co. v. Aetna Explosives Co. (Pa.) 1918E-1078.*

2. **Implied right to remove.**—In the absence of an express contract as to trade fixtures, there is an implied contract permitting the tenant to remove them at the proper time and in a proper manner. *McClintock, etc. Co. v. Aetna Explosives Co. (Pa.) 1918E-1078.*

3. **Stipulation in lease for removal.**—Parties to a lease may stipulate what machinery and fixtures may be removed by the tenant, and, when they have done so, such stipulations are controlling. *Bache v. Central Coal, etc. Co. (Ark.) 1918E-198.*

4. Where a lease reserves to the lessee the right to remove "machinery, apparatus and other things of that character," the consideration of the question of trade fixtures becomes unnecessary, as the rights of the parties with respect to removal of such property are covered by the contract. *McClintock, etc. Co. v. Aetna Explosives Co. (Pa.) 1918E-1078.*

5. Under a lease reserving to the lessee the right to remove "machinery, apparatus and other things of that character," under which the lessee, engaged in working out an experimental process for the manufacture of benzine and gasoline, constructed furnaces connected with various appliances, including a framework to carry pipes and support the furnaces, etc., the term "apparatus" will include mechanical devices adapted as a means to an end, any complex instrument or appliance for the specific action or operation including mechanical and chemical instruments, a full collection or set of implements for a given duty, experimental or operative, and in connection with the provision as to other things of like character, entitled the lessee to remove such furnaces and the building necessary for their proper protection and operation; the fact of the roof covering not

changing their character so as to make it distinct from the contents inclosed so as to preclude its removal. *McClintock, etc. Co. v. Aetna Explosives Co. (Pa.)* 1918E-1078. (Annotated)

6. In a suit in replevin by the successor of the lessee of a coal mine to recover possession of certain property belonging to the mine and owned by the lessee, where the lease provided that at expiration the lessee might remove all machinery, pit cars, mine rails, etc., provided it had carried out the terms of the contract, the question whether the tippie was a part of the mining equipment, and removable as such under the lease, is properly submitted to the jury; "machinery" being a more comprehensive word than "machine," and including appurtenances necessary to the working of a machine, since, under the mining law, mining machinery and apparatus are regarded as personalty of the lessee that may be removed in the absence of express stipulation to the contrary, a stipulation not contained in the lease. *Bache v. Central Coal, etc. Co. (Ark.)* 1918E-198. (Annotated)

7. Time for removal.—Where the lease of a coal mine provided that the lessee might remove machinery, etc., at expiration of the lease, if it had carried out the terms of the contract, not expressly stipulating that the right must be exercised before expiration, and the successor of the lessee proceeds expeditiously to remove its property four days before a ten-day extension of the lease expires, as soon as it is advised that a prospective purchase of the property by the lessor is off, its right to remove its property does not terminate instantly upon expiration of the lease. *Bache v. Central Coal, etc. Co. (Ark.)* 1918E-198.

8. Question of law.—So far as the question of the tenant's right to remove fixtures is governed by the express provisions of the lease, it is a question of law. *McClintock, etc. Co. v. Aetna Explosives Co. (Pa.)* 1918E-1078.

FOOD.

1. Allegations of negligence in storage.—A complaint, alleging that plaintiff's eggs, when placed in storage in defendant's warehouse, were fresh and in good condition, and while stored there became tainted with a foreign and unnatural flavor, is a sufficient pleading of negligence, at least with an allegation that plaintiff does not know the specific acts of defendant's negligence; proof thereof making a prima facie case. *Perry v. Diamond Ice, etc. Co. (Wash.)* 1918C-891. (Annotated)

2. Evidence.—On the issue of the plaintiff's eggs having acquired their foreign and unnatural flavor while in the defendant's cold storage plant, evidence that another's eggs placed in the same room with the plaintiff's eggs came out with the same foreign flavor is admissible, though it be not shown that they did not have it when placed

therein. *Perry v. Diamond Ice, etc. Co. (Wash.)* 1918C-891. (Annotated)

3. The real issue being whether eggs acquired their foreign and unnatural flavor after being placed in the defendant's cold storage plant, any error in admission of evidence of test of the eggs before stored for natural deterioration is not prejudicial. *Perry v. Diamond Ice, etc. Co. (Wash.)* 1918C-891. (Annotated)

4. Evidence in an action for injury to eggs in cold storage is held to be sufficient to show that when stored they were free from unnatural flavor or odor, and acquired it while in the warehouse, making the question of negligence as the producing cause one for the jury. *Perry v. Diamond Ice, etc. Co. (Wash.)* 1918C-891. (Annotated)

FORECLOSURE.

Of mortgages, see *CHATTEL MORTGAGES*, 4-8; *MORTGAGES*, 10-14.

Of pledge, see *PLEDGE*, 4.

FOREIGN CORPORATIONS.

See *CORPORATIONS*, 45-53.

Foreign benefit society as subject to local statutes, see *BENEFICIAL ASSOCIATIONS*, 2.

Priority of claim for wages against insolvent foreign corporation, see *CORPORATIONS*, 43.

FORFEITURE.

Of benefits of employees of relief society, see *MASTER AND SERVANT*, 27.

Of charter of railroad company, see *RAILROADS*, 1-3.

Waiver of forfeiture of insurance policy, see *LIFE INSURANCE*, 3.

FORMAL PARTIES.

See *PARTIES TO ACTIONS*, 1.

FORMER ADJUDICATION.

See *JUDGMENTS*, 10-17.

Decree in divorce suit as conclusive of question of alimony, see *DIVORCE*, 6-9.

FORMER JEOPARDY.

1. Identity of offenses.—Whether an indictment is for the same offense as that charged in a former indictment under which there has been a final judgment is not determined by an inspection and comparison of the indictments under a plea setting up the former judgment in bar. *People v. Brady (Ill.)* 1918C-540.

2. On the trial under such plea the party accused and the particular offense may be shown by parol testimony. *People v. Brady* (Ill.) 1918C-540.

3. *Nolle prosequi*.—After a jury is empaneled and sworn, the prosecutor cannot nolle pros. the indictment or any count without the consent of accused. *People v. Brown* (Ill.) 1918D-772.

4. *Necessity of plea*.—A defense of former acquittal or conviction may be made under the plea of not guilty. *People v. Brady* (Ill.) 1918C-540.

FOURTEENTH AMENDMENT.

Assessment for improvements by front foot rule as violating, see *TAXATION*, 49.

Authority of supreme court to supervise state exercise of police power, see *CONSTITUTIONAL LAW*, 4.

Charter provision entitling only resident owners to sign remonstrance against public improvement as conflicting with, see *TAXATION*, 47.

FRANCHISES.

See *CORPORATIONS*; *FERRIES*; *RAILROADS*; *STREET RAILWAYS*.

Franchise regulating placing of wires as affecting liability of electric company for injuries, see *ELECTRICITY*, 11.

1. *Extension of pre-existing right*.—Where a single spur track was put in when horse power was used by a street railway before the adoption of the present constitution requiring franchises upon public streets to be sold to the highest bidder, a subsequent consent by the city to a double spur track with a loop, necessary on account of the substitution of motor power, is not the granting of an additional franchise, but the conforming of an old turnout to modern conditions, to which the street railway possesses a property right. *Dayton v. South Covington, etc. St. R. Co. (Ky.)* 1918E-229.

FRAUD.

1. What Constitutes:

a. In General, 107.

b. Misrepresentation as to Value, 107.

c. Violation of Rules in Voting Contest, 108.

2. Actions, 108.

See *FRAUDULENT SALES AND CONVEYANCES*; *RESCISSON*, *CANCELLATION AND REFORMATION*.

As ground for setting aside award of arbitrators, see *ARBITRATION AND AWARD*, 3.

Fraudulent misrepresentation avoiding fire insurance policy, see *FIRE INSURANCE*, 5, 6.

In agreement with subscribing stockholders, see *CORPORATIONS*, 30.

In procurement of contract for purchase of land as affecting bona fide purchaser, see *VENDOR AND PURCHASER*, 20-23.

In sale of public lands, see *PUBLIC LANDS*, 2, 3, 10-21.

Secret intention to refuse marital intercourse as fraud, see *MARRIAGE*, 11.

Use of terms "fraud" and "fraudulent" in instructions, see *INSTRUCTIONS*, 1.

What constitutes undue influence, see *UNDUE INFLUENCE*, 1, 2.

1. What Constitutes.

a. In General.

1. *Intent to deceive*.—To constitute fraud, it is unnecessary that a statement to made with the intention to deceive, if it is a statement of fact, or a statement purporting to be a fact but not true as a matter of fact. *McNeer v. Norfleet (Miss.)* 1918E-436.

2. *Necessity of scienter*.—Where the representations of a seller of land are false, are of material facts, and are relied upon by the buyer, it is immaterial, in the latter's suit for a rescission, whether the representations are knowingly false. *Jeffreys v. Weekly (Ore.)* 1918D-690.

b. Misrepresentation as to Value.

3. *Misstatement as to valuation by appraisers*.—False and fraudulent representations in the selling of property by an administrator as to the value placed upon it by appraisers will not sustain an action for deceit in the sale of the property. *Harlow v. Perry (Me.)* 1918C-37.

4. *Misrepresentation of rental value*.—A wilful misrepresentation by a vendor affirming that the rental value of property sought to be exchanged or sold was greater than in truth it was, where the truth in regard to such representation was unknown to the purchaser, and where, under the circumstances, he was justified in relying upon such representation, constitutes actionable fraud. *Wilson v. Robinson (N. Mex.)* 1918C-49.

5. *Representation of invoice value*.—A representation by the plaintiff that the stock of goods which he offered in exchange for other property was of the invoice value of \$12,000 was one of fact, not a mere opinion upon the question of value, and its falsity constituted actionable fraud. *Knopfler v. Flynn (Minn.)* 1918E-538.

6. The falsity of the representation was not discovered until after the acceptance of the goods; such acceptance did not therefore bar a claim for relief from the fraud. *Knopfler v. Flynn (Minn.)* 1918E-538.

7. An inventory or list of the goods taken in the manner stated in the opinion soon after the delivery and acceptance of the same, held, following *Itasca Cedar & Tie Co. v. McKinley*, 124 Minn. 183, properly received in evidence. *Knopfler v. Flynn (Minn.)* 1918E-538.

8. The invoice or cost price of the goods held sufficiently established by competent evidence. *Knopfler v. Flynn (Minn.)* 1918E-538.

9. The evidence sustains the findings of the trial court, and there were no errors in the admission or exclusion of evidence. *Knopfler v. Flynn* (Minn.) 1918E-538.

c. Violation of Rules in Voting Contest.

10. Where defendant, in an action for damages for fraud, organizes a popularity contest to increase the circulation of his newspaper, and plaintiff, with other contestants, secures subscriptions for the paper in order to secure votes, defendant cannot, at the closing of the contest, escape liability for fraudulent balloting or counting of votes by turning the contest over to another, nor can he countenance fraudulent voting; the relation of the parties being contractual in character. *Smead v. Stearns* (Iowa) 1918C-745.

(Annotated)

11. Where the owner of a newspaper institutes a popularity contest in which votes are given for subscriptions to his paper in order to increase his circulation so as to permit him to bid for the county printing, for which subscriptions are required to be bona fide, thereby requiring an act of the subscriber to make them valid, he cannot accept money from one man for a large number of subscriptions without names of the supposed subscribers, where he has made the rule that the subscriptions must be bona fide, and his act in so accepting money is a fraud upon the other contestants than the one for whom the votes are counted, for which the defendant is liable, although the depositor of the money, after the contest, furnishes a list of subscribers covered by his payment. *Smead v. Stearns* (Iowa) 1918C-745. (Annotated)

12. Acquiescence of party defrauded.—Where defendant, in an action for damages for fraud, organizes a popularity contest to increase the circulation of his newspaper, and plaintiff, with other contestants, secures subscriptions for the paper in order to secure votes, the fact that plaintiff's husband protests the counting of invalid votes, but tells the canvassers that the count "was up to them," is no acquiescence in the decision of the canvassers to count such votes. *Smead v. Stearns* (Iowa) 1918C-745. (Annotated)

13. Where defendant organizes a popularity contest to increase the circulation of his newspaper, and plaintiff, with other contestants, secures subscriptions for the paper in order to secure votes, and on the closing of the contest plaintiff agrees that certain persons shall act as judges, she does not thereby acquiesce in the counting of votes not secured according to the rules of the contract, especially where she enters protest at the time against their being counted, and a plea of her acquiescence is no defense to her action for fraud. *Smead v. Stearns* (Iowa) 1918C-745.

(Annotated)

2. Actions.

14. Proof.—Fraud is ordinarily established by circumstantial evidence. *State v. Hyde* (Ore.) 1918E-688.

15. Instructions.—Where defendant, in an

action for damages for fraud, organized a popularity contest to increase the circulation of his newspaper, and plaintiff, with other contestants, secured subscriptions for the paper in order to secure votes, evidence that on the closing of the contest defendant told the one in custody of the ballot boxes to accept money for votes if anyone came along, and soon thereafter the father of one contestant appeared and deposited \$100, is sufficient to warrant the giving of an instruction on conspiracy. *Smead v. Stearns* (Iowa) 1918C-745.

(Annotated)

FRAUDS, STATUTE OF.

Parol agreement for rescission of written contract for sale of goods, see SALES, 7.

Parol agreement to purchase land for mortgagor on foreclosure of mortgage as creating implied trust, see TRUSTS AND TRUSTEES, 8.

Parol trust contradicting deed, see TRUSTS AND TRUSTEES, 9.

1. Contract for joint purchase from third person.—An oral agreement, between two plaintiffs and a corporation, to buy jointly a stock of goods and fixtures at an insolvency sale, that plaintiffs shall furnish half and the corporation half of the price, and that, when the property is purchased, part shall be sold and the proceeds divided, part divided at inventory value, and part divided in specie, is not within St. 1915, § 2308, the statute of frauds relating to contracts for the sale of goods, or section 1684t (4), the uniform sales act, to the same effect. *Stack v. Roth Bros. Co.* (Wis.) 1918C-742. (Annotated)

2. Contract partly within statute.—Where the several stipulations of a several contract are so interdependent that the parties cannot reasonably be considered to have contracted but with a view to the performance of the contract as a whole and any part of the contract violates the statute of frauds, no recovery can be had upon any part of it; but if the several stipulations are not so interdependent but that a distinct engagement as to any one stipulation may be fairly and reasonably extracted from the whole, then there may be a recovery on such distinct engagement, whenever it is clear of the statute of frauds, though the other stipulations are in violation of the statute. *Godefroy v. Hupp* (Wash.) 1918E-494. (Annotated)

3. Under Rem. & Bal. Code, § 5289, an oral contract for the payment of a commission for exchange of personal property for realty is void, so far as realty is concerned, and void in its entirety unless the contract is divisible. *Godefroy v. Hupp* (Wash.) 1918E-494.

(Annotated)

4. Recovery back of part payment under verbal contract.—A party who has repudiated his verbal contract for the sale of land cannot invoke the statute of frauds to enable him to retain what he has received of the purchaser under it, in part performance thereof. *Jones v. Ceres Invest. Co.* (Colo.) 1918C-429.

(Annotated)

FRAUDULENT SALES AND CONVEYANCES.

Validity of postnuptial agreement, see HUSBAND AND WIFE, 12.

1. Mortgage in excess of actual debt.—A mortgage executed to secure a sum far in excess of the mortgagor's debt to the mortgagee is held to be fraudulent and void as to creditors. *Union Securities Co. v. Smith* (Wash.) 1918E-710. (Annotated)

2. Subsequent creditors.—The execution and registration of deeds to a wife and a trustee at a time when the grantor is not indebted, are not fraudulent as to subsequent creditors. *Harris v. Carolina Distributing Co.* (N. C.) 1918C-329.

FREEZING.

Liability of carrier for loss of goods by freezing, see CARRIERS OF GOODS, 3, 5.

FRONT FOOT RULE.

Assessment for improvement by front foot rule as violating fourteenth amendment, see TAXATION, 49.

FUEL.

Power of city to maintain fuel yard, see MUNICIPAL CORPORATIONS, 12.

FUGITIVE.

Who is fugitive from justice within extradition laws, see EXTRADITION, 2.

FUTURES.

Cancellation of securities given to borrow money for use in dealing in futures, see GAMING, 5, 6.

Purchase of futures as gaming, see GAMING, 1.

Recovery of losses under contract for purchase of futures, see GAMING, 2, 3.

GAMING.

Definition of stakeholder, see WORDS AND PHRASES, 10.

1. Purchase of "futures" as gaming.—A contract for the purchase and delivery of a commodity in the future, and for the payment of the difference in price arising out of the rise and fall in the market above or below the contract price, is a "wager" on the future price of the commodity, and is therefore void, when the real intent of the parties is simply to speculate on the rise and fall of prices, and the goods are really not to be delivered. *Cohn v. Brinson* (Miss.) 1918E-134.

2. Recovery back of losses.—Under Laws 1908, c. 118, prohibiting dealings in futures, and declaring such contracts unlawful, and by section 9 providing that the wife, etc., of a person sustaining a loss in future transactions may within five years recover, by suit, the amount so lost as liquidated damages from the broker, agent, or intermediary negotiating such contractions, a bank and trust company doing a regular banking business, not representing any brokers in futures, not receiving market quotations or taking orders for future contracts, but merely loaning money to one dealing in futures, is not an "agent or intermediary," and hence the borrower's wife cannot recover back an alleged loss. *Cohn v. Brinson* (Miss.) 1918E-134. (Annotated)

3. Under Code 1906, § 2302, giving a right to the wife, etc., of any one losing and paying money at gaming or wagering, a right to recover it, without expressly giving a wife the right to recover from a bank money knowingly lent or advanced for the purpose of gambling, and section 2303, declaring "futures" unlawful, and giving her the right to sue for and recover money lost and paid on futures from the principal or agent knowingly receiving the money on such illegal transactions, the wife of one dealing in cotton futures directly with brokers in another state cannot recover money lent or advanced by a bank, with knowledge of the borrower's dealings, and never repaid except by renewals forming a part of the consideration of a note secured by the mortgage of her homestead and other property. *Cohn v. Brinson* (Miss.) 1918E-134. (Annotated)

4. Recovery from stakeholder.—Money deposited with a stakeholder on account of a gambling contract may be recovered from the stakeholder while in his hands by the person making the deposit. *Martin v. Francis* (Ky.) 1918E-289.

5. Cancellation of securities given in gaming consideration.—Under Code 1906, § 2300, rendering absolutely void and unenforceable any contract for the reimbursing or repayment of any money knowingly lent or advanced for the purpose of gambling, and section 2301, providing that any mortgage or conveyance of any real estate to satisfy or secure money loaned or advanced for such purpose shall vest in the wife and children of the mortgagor the whole title of the mortgagor as though he had died intestate, the wife of one to whom defendant bank knowingly lent or advanced money for use in dealing in cotton futures, unpaid except by renewals forming a part of the consideration for a note secured by a mortgage executed by herself and husband, including their homestead and her separate property, is entitled to have the mortgage canceled, whereupon the property would immediately vest in herself and children, if any. *Cohn v. Brinson* (Miss.) 1918E-134.

6. In such case it was immaterial that the borrower had the right to buy cotton futures by mail or wire directly from brokers in another state, since it is the policy of the law

to prohibit gambling of any kind and character. *Cohn v. Brinson* (Miss.) 1918E-134.

7. **Set-off of previous winnings.**—Where in an action to recover money lost at gaming it is claimed, and evidence is offered tending to prove, that part of the money alleged to have been paid by the plaintiff to the defendant was in fact money won by the plaintiff and owing to him from the defendant in a former gambling transaction, it is error for the court to refuse to charge the jury that if it find this claim to be true, then the plaintiff cannot recover that part of his losses in the subsequent transaction represented by the credit given by him by the defendant for money won by plaintiff in a former gambling transaction and in defendant's possession at the time the credit was given. *Hutton v. Curry* (Ohio) 1918C-770. (Annotated)

GARBAGE.

Collection of garbage as governmental function, see **MUNICIPAL CORPORATIONS**, 21. Garbage collector as independent contractor, see **INDEPENDENT CONTRACTORS**, 3.

GARNISHMENT.

See **ATTACHMENT**; **EXECUTION**.

Priority of assignee of proceeds of building contract as against garnishment, see **ASSIGNMENTS**, 8, 9.

1. **Duties of garnishee.**—In an action by a plaintiff against a nonresident defendant, who is served with notice of the same only by publication, it is the duty of a garnishee therein to notify such principal defendant of such garnishment proceedings, if able to do so and, also, to interpose in behalf of such principal defendant any defense thereto of which he is cognizant and which he is able to make.

(a) Where such action is upon a claim or debt assigned to such plaintiff in violation of a statute of another state inhibiting such assignment for the purpose of attachment, garnishment, or other process, outside of such other state, when the creditor, the debtor (being a citizen of such other state), and the person or corporation owing the money intended to be reached by the proceedings in attachment or garnishment are all within the jurisdiction of such other state, so that the res may be as well seized in such other state if not exempt by law, such violation of such statute of such other state is a defense to such garnishment proceedings and should be interposed by such garnishee. *St. Louis, etc. R. Co. v. Crews* (Okla.) 1918C-823.

2. (b) As, in such cases, the res is intangible and cannot be impounded in either state otherwise than by summons or like process, the garnishment process being a summons, the same is regarded as impounded in that state in which such process is first served or jurisdiction thereof first acquired: and, upon the principle of "qui prior est tempore potior

est jure," the pendency in another state of a prior action by such principal defendant, as plaintiff, against such garnishee, as defendant, is a defense against such garnishment proceedings and should be interposed by such garnishee.

(c) A garnishee who has not given such notice and interposed such defenses is guilty of negligence of duty to his creditor (such principal defendant) and will not be allowed to set up payment of a judgment against him in such garnishment proceedings as a defense to an action by such creditor against him for the debt so garnished.

(d) Such garnishee, to be entitled to set up payment of such judgment against him in such garnishment proceedings as a defense to an action against him by such creditor for the debt so garnished, should allege and prove that he discharged his duty to such creditor in respect to giving such notice and making such defenses in such garnishment proceedings. *St. Louis, etc. R. Co. v. Crews* (Okla.) 1918C-823. (Annotated)

3. **Payment by garnishee—Protection in another jurisdiction.**—A judgment against a garnishee in a court that did not acquire jurisdiction of the person of the principal defendant, which does not recite that such garnishee disclosed any defensive matter or any fact other than an admission of his indebtedness to the principal defendant, is not, as against such principal defendant and in favor of such garnishee, an adjudication of any issue as to whether such garnishee discharged his duty to such principal defendant in such garnishment proceedings in respect to notice and defenses.

(a) Such judgment would not be accorded faith or credit as such adjudication in the state in which it is rendered, nor in any other state.

(b) A refusal of a court of a state other than the one in which it was rendered to give such judgment effect as an adjudication of such issue between the garnishee and the principal defendant is not a denial of the same the full faith and credit to which it is entitled under section 905, Rev. St. U. S. 13 Fed. St. Ann. [2d. ed.] 212. *St. Louis, etc., R. Co. v. Crews* (Okla.) 1918C-823.

(Annotated)

GASOLINE.

Regulation of storage, see **EXPLOSIONS AND EXPLOSIVES**.

GIFTS.

1. **Gross or net income.**—A gift of income ordinarily means the net and not the gross income. *Parkhurst v. Ginn* (Mass.) 1918E-982.

GOOD FAITH.

In charging commission of crime, see **LIBEL AND SLANDER**.

In furnishing prescription for intoxicating liquors, see **INTOXICATING LIQUORS**, 6.
 Purchaser in good faith, see **VENDOR AND PURCHASER**, 14-23.

GUARANTY.

Admissibility of declarations or admissions of principal as against guarantor, see **ADMISSIONS AND DECLARATIONS**, 7-9.

Change of name of corporate principal in continuing guaranty contract as affecting liability thereon, see **CORPORATIONS**, 2.

1. **Construction.**—While contracts of guaranty must be strictly construed, they must be construed, like other contracts, according to the intention of the parties. *Scovill Mfg. Co. v. Cassidy (Ill.) 1918E-602.*

2. **Continuing or limited.**—Where a written guaranty shows that the parties look to a future course of dealing or a succession of credits, it is generally considered a continuing guaranty. *Scovill Mfg. Co. v. Cassidy (Ill.) 1918E-602.* (Annotated)

3. A guaranty, reciting that the principal had given an order to the guaranteee for the manufacture of goods and expected in future to give other orders, and agreeing, in consideration that the guaranteee would manufacture and deliver all such goods to the principal as required "from time to time," to become surety for the punctual payment by the principal of all money "which shall become due" for goods "which have been or shall hereafter be ordered" by the principal, etc., is a continuing guaranty. *Scovill Mfg. Co. v. Cassidy (Ill.) 1918E-602.* (Annotated)

4. **Limitation as to amount.**—In a guaranty of prompt payment for goods to be ordered, the effect of a provision to make up deficiency in such payment not exceeding \$5,000, is not that the guarantors shall be liable only if the goods ordered and delivered shall not exceed in value \$5,000, but that their liability shall be limited to that amount. *Scovill Mfg. Co. v. Cassidy (Ill.) 1918E-602.*

5. **Evidence.**—In action on a guaranty corporation's orders for goods, evidence is held to be sufficient to show delivery of the goods to the corporation, and its failure to pay for them. *Scovill Mfg. Co. v. Cassidy (Ill.) 1918E-602.*

GUARDIAN AND WARD.

Effect of appointment of guardian for principal as affecting contract for employment of agent, see **AGENCY**, 9.

Guardian ad litem, see **INFANTS**, 1-5.

Guardian for alien minor, see **ALIENS**, 6.

to impose any servitude upon the lot. *Silverman v. Betti (Mass.) 1918C-90.*

GUEST.

Injury to person riding as guest in automobile, see **AUTOMOBILES**, 14-17.

Liability of innkeeper for insult to guest, see **INNKEEPERS**, 1, 2.

HABEAS CORPUS.

Review of proceedings in juvenile court by habeas corpus, see **INFANTS**, 14, 15.

1. **Nature and scope of remedy.**—The writ of habeas corpus cannot be made to serve the purpose of an appeal or writ of error. *State v. West (Tenn.) 1918D-749.*

HABENDUM CLAUSE.

See **DEEDS**, 5.

HAWKERS AND PEDDLERS.

1. **Discrimination.**—A city ordinance, requiring by subdivision "a" a license fee of \$100 per year, payable in advance, to peddle or take orders for any fresh meat or any goods, wares, or merchandise of a general character, or for teas, coffees, spices, extracts, clothing, dresses, knit goods, or underwear, by subdivision "b" a fee of \$7.50 per quarter for peddling or taking orders for any or all kinds of fruit, vegetables, farm or dairy products, fish or poultry, and by subdivision "c" a license fee of \$7 per quarter or \$3 per month for taking orders for any literature, music, or small articles for household use or ornament manufactured by the peddler, is in violation of *Comp. Laws 1907*, § 206, subd. 87, providing that all license fees and taxes shall be uniform in respect to the class upon which they are imposed, as discriminating against those who may peddle or solicit any of the articles mentioned in subdivision "a" and in favor of those peddling articles mentioned in the other two subdivisions of the ordinance. *Park City v. Daniels (Utah) 1918E-107.* (Annotated)

2. A city ordinance, requiring a license fee for peddling or selling certain provisions, articles of general merchandise, and articles for household use, violates *Comp. Laws 1907*, § 206, subd. 87, requiring all such fees to be uniform in respect to the class upon which they are imposed, in discriminating in favor of the local merchants of the city engaged in selling the same articles. *Park City v. Daniels (Utah) 1918E-107.* (Annotated)

3. While city authorities may impose license and occupation taxes, and may make reasonable classifications for such purpose, such fees and taxes must, under the express terms of *Comp. Laws 1907*, § 206, subd. 87, be uniform in respect to the class upon

which they are imposed. *Park City v. Daniels* (Utah) 1918E-107. (Annotated)

4. A city ordinance, requiring a \$100 license fee for peddling "wares and merchandise of a general character" and a fee of \$7 a quarter for peddling "small articles for household use," is discriminatory because of the uncertainty of its terms, since the same articles might be construed to be included within the ordinance by one court or jury and to be excluded by another. *Park City v. Daniels* (Utah) 1918E-107. (Annotated)

HEALTH INSURANCE.

See INSURANCE, 48-53.

HEARSAY EVIDENCE.

See EVIDENCE, 9.

HEIRS.

See DESCENT AND DISTRIBUTION; WILLS.

Action to recover realty, see EXECUTORS AND ADMINISTRATORS, 11.

Money in hands of heirs as assets, see EXECUTORS AND ADMINISTRATORS, 12.

HIGHWAYS.

See STREETS AND HIGHWAYS.

HOLIDAYS.

See SUNDAYS AND HOLIDAYS.

HOMICIDE.

1. Manslaughter, 112.

2. Indictment or Information, 112.

3. Evidence:

a. Admissibility, 112.

b. Weight and sufficiency of evidence, 112.

4. Province of Court and Jury, 113.

5. Instructions, 113.

See DYING DECLARATIONS.

Admissibility of declaration of third person injured in altercation, see ADMISSIONS AND DECLARATIONS, 20.

Admissibility of declaration of victim of homicide, see ADMISSIONS AND DECLARATIONS, 18, 19.

Assault with intent to kill, see ASSAULT, 1, 2.

By negligent operation of automobile, see AUTOMOBILES, 26.

Jurisdiction of juvenile court of infant alleged to have committed homicide, see INFANTS, 9, 12.

1. Manslaughter.

1. Manslaughter is the unlawful killing of

another without malice, either upon a sudden quarrel or unintentionally, while the slayer is in the commission of an act made unlawful by a valid statute. *State v. Schaeffer* (Ohio) 1918E-1137.

2. In an indictment for manslaughter such unlawful act need not be pleaded in the indictment. The short form of indictment provided in section 13583, General Code, is not in conflict with the constitutional guaranty that the accused shall be advised of "the nature and cause of the accusation against him." *State v. Schaeffer* (Ohio) 1918E-1137.

2. Indictment or Information.

3. Where an indictment for manslaughter charges the defendant with having "unlawfully killed Adelbert Chaky," sometimes otherwise known as Buley Csaki," and there is no evidence tending to prove the alias, or that both names were the names of the same person, such failure is not a fatal variance, because it is not prejudicial to the merits of the case and the substantial rights of the defendant. *State v. Schaeffer* (Ohio) 1918E-1137.

3. Evidence.

a. Admissibility.

4. Identity of deceased.—Under Pen. Code 1895, art. 654, requiring the identification of the body of deceased as that of the person charged to have been killed, the state is bound to prove the corpus delicti, and the amount of proof of identification cannot be complained of. *McCue v. State* (Tex.) 1918C-674.

5. Under this statute, circumstantial evidence is admissible to prove identity. *McCue v. State* (Tex.) 1918C-674.

6. Letters, memoranda, etc.—In a prosecution for homicide, where the body is not clearly identified by any witness, letters, memoranda, etc., found in a grip near the body and in the clothes, are admissible to prove identity. *McCue v. State* (Tex.) 1918C-674. (Annotated)

7. But such memoranda, etc., are not admissible to show that deceased had in his possession a considerable sum of money. *McCue v. State* (Tex.) 1918C-674.

8. Possession of money by accused.—Where it is shown that immediately before the killing accused was short of money and pawned his watch, evidence that after the killing accused was freely spending money in saloons and immoral resorts is admissible, where it appears that deceased, when killed, had in his possession a considerable sum of money. *McCue v. State* (Tex.) 1918C-674.

b. Weight and Sufficiency of Evidence.

9. The evidence is held to sustain a conviction for murder against a plea of self-defense. *Holland v. State* (Ark.) 1918C-578.

10. In a prosecution for murder, the evidence reviewed and held sufficient to sustain the conviction with imprisonment for life.

as the punishment. *Poling v. State* (Okla.) 1918E-663.

11. **Corroboration of accomplice.**—Testimony that a knife found by the body of deceased, who had been stabbed and beaten to death, belonged to accused, is sufficient corroboration of the testimony of a self-confessed accomplice to justify a conviction upon the accomplice's testimony. *McCue v. State* (Tex.) 1918C-674.

4. Province of Court and Jury.

12. **Alibi.**—In a prosecution for homicide, where the evidence on alibi is conflicting, the question is for the jury. *McCue v. State* (Tex.) 1918C-674.

5. Instructions.

13. **Reasonableness of belief in danger.**—An instruction that the accused was justified in shooting if he believed, "acting as a reasonable person," he was in danger, etc., is not reversible error because of the quoted words, where the accused was not shown to have been of inferior mental capacity. *Holland v. State* (Ark.) 1918C-578.

14. **Act of accused as proximate cause of death.**—The unlawful act relied upon as the predicate for manslaughter must be the proximate cause of death. If death resulted from any other cause, or there be a reasonable doubt as to the unlawful act being the proximate cause of death, the jury should acquit. But where, upon the undisputed facts, it clearly and conclusively appears to a moral certainty that the unlawful act complained of was the proximate cause of death, a failure to so charge, especially where there was no request to so charge, is not reversible error. *State v. Shaeffer* (Ohio) 1918E-1137.

15. **Submission of included offenses.**—Where all the evidence clearly and conclusively shows that the unlawful act relied upon by the state directly caused the killing, and there is no evidence to the contrary, the failure of the court to charge on assault, or assault and battery, is not error. (*Marts v. The State*, 26 Ohio St. 162, and *Dresback v. The State*, 38 Ohio St. 363, approved and followed. So far as the case of *Lindley v. The State*, 69 Ohio St. 215, is in conflict with the two foregoing cases, said *Lindley* case is disapproved.) *State v. Schaeffer* (Ohio) 1918E-1137.

HOSPITALS AND ASYLUMS.

Hospital as charity, see **CHARITIES**, 1.
Liability of charitable institution operating hospital for injury to patient, see **CHARITIES**, 4.

HOTELS.

See **INNS AND INNKEEPERS**.
Ann. Cas. Dig. 1918C-E.—8.

HUMILIATION.

From disfigurement as element of damage in action for personal injury, see **DAMAGES**, 2.

HUSBAND AND WIFE.

1. Disabilities of Married Women, 113.
2. Antenuptial Contracts, 114.
3. Wife's Separate Property, 114.
4. Rights and Liabilities Inter Se, 114.
5. Community Property, 115.
6. Rights against Third Persons, 116.
7. Liability to Third Persons, 116.

See **ALIMONY AND SUIT MONEY**; **DIVORCE**; **MARRIAGE**.

As competent witnesses for or against each other, see **WITNESSES**, 3-5.

Attachment on community property, see **ATTACHMENT**, 1, 2.

Conveyance to wife as fraudulent, see **FRAUDULENT SALES AND CONVEYANCES**, 2.

Curing defective acknowledgment in conveyance from wife to husband, see **ACKNOWLEDGMENTS**, 6.

Effect of defective acknowledgment in deed from wife, see **ACKNOWLEDGMENTS**, 1.

Estate by entirety as subject to execution, see **EXECUTIONS**, 1.

Estoppel of wife to deny validity of contract of employment by husband of attorney, see **ATTORNEYS**, 2.

Lien of judgment on community property, see **JUDGMENTS**, 6.

Purchase by wife in name of husband as resulting trust, see **TRUSTS AND TRUSTEES**, 4.

Right of wife to recover for money lost by husband in purchase of futures, see **GAMING**, 2, 3, 5, 6.

1. Disabilities of Married Women.

1. Contract to convey—Acknowledgment.

A married woman can bind her land for sale only by a writing which she duly acknowledges as the statute requires. *Weekly v. Wagner* (W. Va.) 1918E-630.

2. Where a married woman by a written option executed only by her signature and seal, agrees to convey her land to another in case he elects to take the same within a stipulated time, her acknowledgment of the same made before a notary after the time fixed for such election has expired, will not, without more, revive and legalize the agreement and an election made under it within the time. *Weekly v. Wagner* (W. Va.) 1918E-630. (Annotated)

3. **Deeds—Sufficiency of joinder of husband.**—The deed of a married woman, signed and acknowledged by herself and husband, although the latter is not named as a grantor, evidences the husband's joinder in the deed, and passes the wife's title to her separate real estate. *Linn v. Collins* (W. Va.) 1918C-86.

2. Antenuptial Contracts.

4. Effect on marital rights.—The marital rights of husband and wife will not be taken away by an antenuptial agreement, unless the intention to do so is clearly apparent. *Baughman v. Baughman* (Ill.) 1918E-895.

5. Construction.—An antenuptial marriage settlement examined, and held binding only if the husband desired to dispose of his property otherwise than as under the statute of descents. *Baughman v. Baughman* (Ill.) 1918E-895.

6. An antenuptial marriage contract examined, and held executory and not binding upon the parties as to the rights of their own child; she being a minor at her father's death. *Baughman v. Baughman* (Ill.) 1918E-895.

7. Marriage settlements.—The law favors marriage settlements and seeks to uphold them, and will, if necessary, strain to the uttermost the interpretation of equivocal words and conduct to hold the parties thereto. *De Cicco v. Schweizer* (N. Y.) 1918C-816.

3. Wife's Separate Property.

8. Evidence showing purchase with separate funds.—In a suit by a wife to quiet title to real estate, sold on execution against her husband, the evidence is held to be sufficient to support the finding that the property was purchased with the separate funds of the wife, and not with the proceeds of a sale of community property. *McKeehan v. Vollmer-Clearwater Co.* (Ida.) 1918E-1197.

9. Where there is a conflict of evidence as to whether property claimed as separate property of the wife was purchased out of the proceeds of the sale of community property, and the trial court finds that it was not so purchased, the finding will not be disturbed. *McKeehan v. Vollmer-Clearwater Co.* (Ida.) 1918E-1197.

10. Where defendant father made a valid agreement with his wife that property inherited by her and which she acquired should remain her separate property, the evidence is held to be sufficient to justify a finding that property purchased for her by her son with her money and with money which the son owed her for rent, etc., was her separate property, and that part of the purchase price paid by the son with his own money should be credited upon his debt to her. *Union Securities Co. v. Smith* (Wash.) 1918E-710.

11. Earnings of wife.—Section 1087, C. L. 1884, and section 1509, C. L. 1897, which defined "separate property" of the wife and further provided that, "and any woman may, during coverture, receive, take, hold, use, and enjoy property of any and every description, and all avails of her industry, free from any liability of her husband on account of his debts, as fully as if she were unmarried" construed. Held, that the clause quoted simply exempted the earnings of the wife from liability for the debts of the husband, and did not make the

wife's earnings her own separate property. *Albright v. Albright* (N. Mex.) 1918E-542.

12. Postnuptial agreement.—In an action to set aside as fraudulent certain deeds and a mortgage of real estate, and to subject the property to the lien of a judgment, the evidence is held to establish a valid oral postnuptial agreement between husband and wife that property inherited by the wife from her father and whatever she acquired should be hers, and upon her death go to her children, and that whatever the husband acquired and his personal earnings should be his, and upon his death go to his two children by a former marriage, which was continuously acted upon by the parties transacting their business separately. *Union Securities Co. v. Smith* (Wash.) 1918E-710.

4. Rights and Liabilities Inter Se.

13. Validity of contracts.—Agreements made between husband and wife, looking to the adjustment of their property rights, standing alone, are not invalid. *Hood v. Roleson* (Ark.) 1918E-900.

14. Contract facilitating divorce.—A contract between husband and wife, whereby part of the consideration for his execution of a note was that the wife should not file an answer to his cross-complaint for divorce and should make no defense to the action, is void as against public policy, notwithstanding the existence of legal grounds for divorce, since an agreement intended to facilitate procuring a divorce is against public policy, any promises founded thereon being void. *Hood v. Roleson* (Ark.) 1918E-900. (Annotated)

15. Formal requisites of deed.—A deed to lands from a wife to her husband is a "contract" within Revisal 1905, § 2107, providing that no contract between a husband and wife during coverture shall be valid as to any part of the wife's realty for a longer time than three years, unless it shall be in writing and duly proved as required for conveyances of land, and unless, upon the examination of the wife apart from her husband, as required in probate of deeds of femes covert, it shall appear to the satisfaction of the officer that the wife freely executed such contract and freely consented thereto at the time of her separate examination, and that the same is not unreasonable and injurious to her, since until delivery a deed is an executory contract, becoming executed upon delivery. *Butler v. Butler* (N. C.) 1918E-638.

16. Revisal 1905, § 2107, providing that no contract between a husband and wife made during coverture shall be valid to affect or charge any part of the real estate of the wife for a longer time than three years, unless in writing and duly proved as required for conveyances of land and unless upon the examination of the wife, separate from her husband, it shall appear to the satisfaction of the officer that the wife freely executed the contract and freely consented thereto at the time of her separate examination, and that the same is not unreasonable or in-

jurious to her, is a constitutional exercise of legislative power. *Butler v. Butler* (N. C.) 1918E-638.

17. Action against husband for wrongful death.—Under Acts 1915, p. 684, removing the disabilities of married women and providing that a married woman in law and equity shall enjoy all rights and be subjected to all laws as though she were a feme sole, a married woman may maintain an action against her husband either for contract or tort, and her representatives may sue her husband for wrongful death under Kirby's Dig. § 6289. *Fitzpatrick v. Owens* (Ark.) 1918C-772.

5. Community Property.

18. Purchase by husband with wife's guaranty.—Where a husband purchases stock with money earned by himself, and his wife is not concerned in the purchase, and signs a bond as stockholder, guaranteeing the indebtedness of the company to a bank, there being a valid agreement between husband and wife that his earnings should be his separate property, his act in signing the bond does not create a community obligation. *Union Securities Co. v. Smith* (Wash.) 1918E-710.

19. Evidence.—The evidence is held to be sufficient to support a finding that an undivided one-half of land purchased by the defendants father and son, title to which was taken in the name of defendant father's wife, was the community property of defendant father and his wife. *Union Securities Co. v. Smith* (Wash.) 1918E-710.

20. In a suit instituted by a daughter against her father for the partition of the real estate owned by her mother at the time of her death, she having died intestate, the uncorroborated evidence of the father is sufficient to sustain a finding by the trial court that the real estate, standing in the name of the wife at the time of her death, was community property. Section 2175, Code 1915, has no application to a suit between heirs for the partition of the real estate of their ancestor. *Albright v. Albright* (N. Mex.) 1918E-542.

6. Rights against Third Persons.

21. Right of wife to sue for loss of consortium.—A wife has no right of action at common law against a person for the loss of the consortium of her husband caused by personal injuries sustained by him through the negligence of such person. *Smith v. Nicholas Bldg. Co.* (Ohio) 1918D-206.

(Annotated)

7. Liability to Third Persons.

22. Contract by husband.—Where a husband contracts to pay a broker a commission for an exchange of property, a judgment, broad enough to be considered as a personal judgment against the wife individually, is erroneous. *Godefroy v. Hupp* (Wash.) 1918E-494.

23. Estoppel to deny husband's title.—A married woman purchased real property with

her own funds, allowing her husband to act as her agent in the transaction, and the title was taken in the name of her husband contrary to her instructions. The wife, being unable to read, believed her husband's statement that the title was in her name, and nothing happened to put her on inquiry or arouse her suspicions to the contrary. It is held that she was not estopped to claim title as against an execution creditor of her husband. *McKeehan v. Vollmer-Clearwater Co.* (Ida.) 1918E-1197. (Annotated)

ICE PLANT.

Power of city to operate, see **MUNICIPAL CORPORATIONS**, 11.

IDENTITY.

Identification of devisee, see **WILLS**, 29-34.
Proving identity of deceased in prosecution for homicide, see **HOMICIDE**, 4-7.

ILLEGAL CONTRACTS.

See **CONTRACTS**, 12-20.

Validity of agreement to divide fees of public officer, see **PUBLIC OFFICERS**, 12.

ILLNESS.

Health insurance, see **INSURANCE**, 48-53.

IMPENDING DEATH.

Admissibility of dying declarations as affected by impending death, see **DYING DECLARATIONS**, 2, 3.

IMPLIED CONTRACTS.

Implied agreement for compensation for services rendered to parent, see **PARENT AND CHILD**, 3.

Of consignee to pay freight, see **CARRIERS OF GOODS**, 9.

To pay broker's commission, see **BROKERS**, 4, 5.

IMPLIED TRUST.

See **TRUSTS AND TRUSTEES**, 1-13.

IMPROVEMENTS.

Apportionment as between life tenant and remainderman of assessment for public improvements, see **LIFE ESTATES**, 23-25.
Cost of improvements as chargeable to principal or income of trust estate, see **TRUSTS AND TRUSTEES**, 27, 30, 31.

Liability of grantee of lessor under latter's covenant to pay for improvements, see **LANDLORD AND TENANT**, 8.

Reimbursement of life tenant for improvements, see **LIFE ESTATES**, 19.

Taxation for public improvements, see **TAXATION**, 44-51.

IMPUTED NEGLIGENCE.

Imputation of negligence to person riding in automobile, see **AUTOMOBILES**, 24.

INCLUDED OFFENSES.

Inclusion of lesser offenses in information, see **INDICTMENTS AND INFORMATIONS**, 9.

INCOME.

Gift of income, see **GIFTS**, 1.

INCOME TAXES.

See **TAXATION**, 59.

INCONSISTENT POSITION.

In litigation, see **ESTOPPEL**, 2.

INCUMBRANCES.

Covenant against, see **DEEDS**, 11, 12.

INDEMNITY.

See **GUARANTY**.

Indemnity insurance, see **INSURANCE**, 23-36, 39-44.

Right of city to indemnity from abutting owner against judgment recovered for injuries to pedestrian resulting from icy condition of sidewalk, see **STREETS AND HIGHWAYS**, 16, 17.

1. **Construction.**—Where an electric company constructing a line close to that of another company agrees to save the latter harmless from all damage by reason of the negligence of the first mentioned company "or otherwise" the indemnitee is not entitled to be indemnified against a liability resulting in part from its own negligence. *Toronto v. Lambert* (Can.) 1918D-57.

INDEPENDENT CONTRACTORS.

1. **Who Are**, 116.

2. **Liability of Owner**, 117.

See **CONTRACTS; MASTER AND SERVANT**.

Company furnishing fireworks to committee having charge of Fourth of July celebration as independent contractor, see **THEATERS AND AMUSEMENTS**, 8.

1. Who Are.

1. An "independent contractor" is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, without being subject to the control of his employer except as to the result of the work. *Bodwell v. Webster* (Neb.) 1918C-624. (Annotated)

2. **Tests of relation.**—While the existence or the absence of the right of the employer to control the work is a usual test to determine whether the workman is a servant or an independent contractor, the right of the employer to discharge him, the absence of an independent occupation, and the mode of compensating him and his subordinates, may be factors indicating the true relation. *Bodwell v. Webster* (Neb.) 1918C-624. (Annotated)

3. **City garbage collector.**—One who performs services for a city in the matter of removing garbage under a written contract which contains a provision that he is to furnish teams and men or such number thereof as in the judgment of said city may be necessary, and that the entire work is to be done in a good and substantial manner, with the approval and acceptance of the city, and under the supervision and direction of the commissioner of health, and that his teams and equipment shall be acceptable and satisfactory to said health commissioner, is held to be an independent contractor, and not a servant of said city. *Montain v. Fargo* (N. D.) 1918D-826.

4. **Person hauling logs.**—Under Workmen's Compensation Law (Pub. Acts Ex. Sess. 1912, No. 10), pt. 1, § 5, providing that every person or corporation who has any person in service under any contract of hire, shall be an employer, a person who hauls logs for a lumber company over its road under an oral agreement, for no definite period, to use his own team, which he keeps and cares for, with the company's sleighs, in hauling logs from a skidway to a mill, at \$2 per thousand, and who has charge of his team on the road and who has nothing to do with the unloading, is an "employee," since the company has such control over his work as to make it inconsistent to say that he is an "independent contractor;" the test of relationship being the right to control the work, and not the fact of actual interference with the work. *Tuttle v. Embury-Martin Lumber Co.* (Mich.) 1918C-664. (Annotated)

5. In such proceeding, where there was no evidence that the employee knew that the company's foreman could prevent a man working by the thousand from taking a load if he so desired, evidence of any such custom is inadmissible, since a custom is admissible only on the ground that the parties are both cognizant of it, and must be presumed to have made their engagement

with reference to it. *Tuttle v. Embury-Martin Lumber Co.* (Mich.) 1918C-664.

(Annotated)

6. Evidence.—In an action by a servant for injuries, defense being he was not an employee, error in permitting him to testify as to his hiring for defendants by one not shown to have authority, from defendants, is held not to be reversible, in view of the nature of plaintiff's employment and the insuring of plaintiff and others as defendants' employees. *Sempier v. Goemann* (Wis.) 1918C-670.

7. Question for jury.—Where the relation between the owner of a building and a workman engaged to repair it is not evidenced wholly by a written instrument, but is affected by extrinsic facts and circumstances, from which different deductions may reasonably be drawn, whether the workman was an independent contractor is a question for the jury. *Bodwell v. Webster* (Neb.) 1918C-624.

(Annotated)

8. In an action by a servant for injuries, whether one in charge of the work of piling logs in which defendant was engaged when injured and who was paid a certain sum per thousand while in charge of such work was an independent contractor, is held to be a question for the jury. *Sempier v. Goemann* (Wis.) 1918C-670.

(Annotated)

2. Liability of Owner.

9. Where work is done by an independent contractor, no liability exists against the other party to the contract for personal injuries to the negligent contractor's employee. *Teeters v. Des Moines* (Ia.) 1918C-659.

10. While an employer is not responsible for the negligence of an independent contractor who hires his own agents and employees and does all the work free from any control or right of control as to details, yet, where the contract calls for the doing of things which, unless precautions are taken, are liable to do injury to others, it is the employer's duty to see that such precautions are taken, and he cannot escape such duty by turning over the whole matter to the contractor. *Sroka v. Halliday* (R. I.) 1918D-961.

11. The mere fact of the nominal employment of a workman as an independent contractor will not relieve the master of liability for his torts, where he is in fact employed as a servant. *Bodwell v. Webster* (Neb.) 1918C-624.

(Annotated)

12. County paving city street.—Code, § 1530, provided that the board of supervisors of each county should levy a tax for the county road fund: the portions collected within cities or incorporated towns to be expended upon the streets of such cities or towns, or on roads adjacent thereto, "under the direction of the city or town council." A city council directed the board of public works to grade a city street and expend money from the county road fund for the work. The county board of supervisors undertook to do the work provided by the resolution, and the plaintiff was hired by them to work

on the grading job. He was ordered by the foreman, an employee of the county, to drive on the fill and empty his wagon. The fill gave way and plaintiff was injured. He sued the city, claiming that the county was its agent in the work. It is held that the city had no supervision of the work sufficient to establish agency and make the plaintiff its servant, but that the county was an independent contractor, and therefore plaintiff could not recover. *Teeters v. Des Moines* (Ia.) 1918C-659.

(Annotated)

13. Under Code, § 1530, providing that the expenditures of money for road work on streets of cities or towns or on roads adjacent thereto shall be done by the board of supervisors, "under direction of the city or town council," it is immaterial on the question of the city's liability for personal injuries to one employed on the work when done by the county whether the road is within or without the city. *Teeters v. Des Moines* (Ia.) 1918C-659.

(Annotated)

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Reliance on index of registry of deeds in searching title, see ABSTRACT OF TITLE, 2, 3.

INDIANS.

1. Effect of state law.—Act Cong. April 28, 1904, c. 1824, 33 Stat. 573, providing that "all the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said territory, whether Indian, freedman, or otherwise," was not intended to supplant or supersede any special enactment of Congress with regard to Indians, but the purpose and effect thereof were to abolish all general existing tribal laws of the Seminoles, and to substitute therefor the laws in force and which had for years governed all persons in Indian Territory, save Indians in their intercourse with one another. *Palmer v. Cully* (Okla.) 1918E-375.

2. Upon the erection of the state, members of the tribes became citizens of Oklahoma, subject to the general state laws relative to marriage and divorce, since which time the validity of their marriage contracts and all rights consequent thereon have been dependent upon such laws. *Palmer v. Cully* (Okla.) 1918E-375.

(Annotated).

INDICTMENTS AND INFORMATIONS.

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2. Amendment, 118.

3. Bill of Particulars, 118.

See EMBEZZLEMENT, 1-3; HOMICIDE, 3; RAPE, 1-3.

In prosecution for assault with intent to kill, see ASSAULT, 1.

In prosecution under anti-tipping act, see TIPS, 1.

Obtaining money by means of confidence game, see FALSE PRETENSES, 1, 2.

1. Charging Offense.

1. **Validity of statute prescribing form.**—Code Cr. Proc. § 229, subd. 6, as amended by laws 1913, c. 242, declaring that an information is sufficient where it can be understood therefrom that the offense is designated in such a manner as to enable a person of common understanding to know what is intended, requires an information which, as required by Const. art. 6, § 7, will give accused the nature and cause of the accusation against him, and is valid. *State v. Morse*, (S. D.) 1918C-570. (Annotated)

2. **Gen. Laws 1909, c. 345, § 18**, as to necessary allegations in indictment for embezzlement and the indictments drawn thereunder do not violate Const. art. 1, § 10 providing that an accused shall not "be deprived of life, liberty or property, unless by . . . the law of the land," nor that portion of Const. U. S. Amend. 14, § 1, providing for due process of law, and equal protection of the law. *State v. Davis* (R. I.) 1918C-563. (Annotated)

3. **Cr. Code (Hurd's Rev. St. 1913, c. 38), § 99**, providing that in every indictment for obtaining money or property by means of the confidence game it shall be deemed a sufficient description of the offense to charge that accused did on, etc., unlawfully and feloniously obtain from a named person his money or property by means and by use of the confidence game, does not violate Const. art. 13, § 9, giving the accused the right to demand the nature and cause of the accusation against him. *People v. Brady* (Ill.) 1918C-540. (Annotated)

4. **Const. art. 1, § 10**, declaring that in all criminal prosecutions the accused shall enjoy the right "to be informed of the nature and cause of the accusation," requires no greater certainty in criminal pleading than the common law, which required that the elements of the crime be fully set out. *State v. Davis* (R. I.) 1918C-563.

5. **The object of Const. art. 13, § 9**, giving accused the right to demand the nature and cause of the accusation, is notice to the accused, and, when the statute so individuates the offense that an indictment in its language is notice to him of the nature and cause of the charge and what he is really to be tried for, it is insufficient. *People v. Brady* (Ill.) 1918C-540.

6. **An indictment is good which charges a statutory offense in the language of the statute creating it**, subject to the qualification that the indictment must by statutory description or other apt averment so identify the offense as to meet the constitutional right of accused to demand the nature and cause of the accusation, but the legislature may provide that the property which is the subject of the crime may be described by words of general description. *People v. Brady* (Ill.) 1918C-540. (Annotated)

7. **Construction of statute.**—Under Cr. Code, § 408, providing that every indictment shall be deemed sufficient which states the offense in the language of the statute creating it and so plainly that the nature of the offense may be thoroughly understood by the jury, an indictment, setting forth the offense so that the accused can be at no loss to know what he is accused of so that he may prepare his defense and so that a conviction thereunder may be pleaded in bar of another prosecution for the same offense, is sufficient. *People v. Brady* (Ill.) 1918C-540. (Annotated)

8. **The requirement that the indictment allege the offense with such form that it can be made the foundation of a plea in bar to a later indictment does not require such minute particularity that the first indictment may constitute a bar without oral proof of identity of offenses charged**, since such oral proof is allowed, and under Gen. Laws 1909, c. 278, § 3, requiring an official stenographic report of the proceedings of a criminal trial, determination as to identity of issues is easy. *State v. Davis* (R. I.) 1918C-563.

9. **Included offenses.**—Though an offense includes lesser offenses, an information charging the offense need not incorporate all of the ingredients constituting the lesser offenses. *State v. Morse* (S. Dak.) 1918C-570.

10. **Joinder of two offenses.**—An indictment for violation of a statute regulating hours of labor in manufacturing or mercantile establishments which alleges the operation of both a manufacturing and a mercantile establishment and the employment of females therein in violation of the statute charges but a single offense. *Hotchkiss v. District of Columbia* (D. C.) 1918D-683.

2. Amendment.

11. **An indictment can be amended in matter of substance only by the grand jury which returned it, or with the consent of accused under Gen. Laws 1909, c. 354, § 4**, providing for amendment of indictment with consent of accused. *State v. Davis*, (R. I.) 1918C-563.

3. Bill of Particulars.

12. **Power of court.**—A court may order a bill of particulars by virtue of its general authority to regulate trials. *State v. Davis* (R. I.) 1918C-563.

13. **Purpose.**—The object of a bill of particulars, in case where the offense is charged in general terms, is to give information which will be of service to the accused in preparing for trial. *State v. Davis* (R. I.) 1918C-563.

14. **Right to bill of particulars.**—A bill of particulars is not required to be given under an indictment charging the confidence game in the language of the statute, either to enable the accused to know what he is charged with, or that he may plead the judgment in bar of another prosecution for the same offense. *People v. Brady* (Ill.) 1918C-540.

15. Unless otherwise provided by statute, an application for a bill of particulars is addressed to the judicial discretion. *State v. Davis* (R. I.) 1918C-563.

16. Aiding bad indictment.—A bill of particulars will not aid a bad indictment. *People v. Brady* (Ill.) 1918C-540.

17. As amendment.—A bill of particulars is not an amendment of an indictment, nor does it supply a defect therein. *State v. Davis* (R. I.) 1918C-563.

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INFANTS.

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1. Actions.

a. Guardian ad Litem or Next Friend.

1. Power to appoint.—The power to appoint a guardian ad litem to manage the defense of an infant is one inherent in every court of justice. *Flynn v. Flynn* (Ill.) 1918E-1034.

2. Effect of failure to appoint.—Failure to appoint a guardian ad litem for an infant defendant, who has been duly served with process, is reversible, but not jurisdictional, error, and renders the decree pronounced against such infant voidable, but not absolutely void. *Linn v. Collins* (W. Va.) 1918C-86.

3. Reappointment in appellate court.—A minor having an interest in proceedings to probate a will is properly made a party to such proceedings, and, on contestant's appeal from the county court, the circuit court, on the transcript of the record in the county court, may properly appoint for the minor, to protect her interests, the guardian ad litem appointed in the county court. *Flynn v. Flynn* (Ill.) 1918E-1034.

4. Duty to follow case on appeal.—A guardian ad litem, for a minor interested in the admission to probate of a will, appointed in the county court, is under duty to appear

in the circuit court, when the contestant appeals the case to such court. *Flynn v. Flynn* (Ill.) 1918E-1034.

5. Taxation of fees.—The contestant of a will, who appealed from the county to the circuit court from an order admitting the will to probate, is properly required to pay the fees of a guardian ad litem appointed by the county court for an infant defendant, and also appointed by the circuit court; the will having been admitted to probate in the circuit court. *Flynn v. Flynn* (Ill.) 1918E-1034.

b. Proceedings before Master.

6. Erroneous order.—Proceeding to carry out contract.—In a proceeding on account of the infancy of a party in interest seeking the aid of the court to carry out the provisions of an option timber contract, if the master attempts to exceed his authority and convey a fee in the timber, the excess over the rights and privileges as set forth in the option is void. *Berry v. Marion County Lumber Co.* (S. C.) 1918E-877.

2. Criminal Responsibility.

7. Capacity to commit crime.—The presumption of incapacity of a child to commit a crime is conclusive when the child is under the age of 7 years; and if between 7 and 14, the burden is on the state to show that the child is capable of appreciating the nature of his acts. *Juvenile Ct. v. State* (Tenn.) 1918D-752.

3. Juvenile Courts.

a. Jurisdiction.

8. Jurisdiction.—In a proceeding in the juvenile court for delinquency of a child alleged to have killed his playmate, the age of the child is immaterial; the procedure not being criminal. *Juvenile Ct. v. State* (Tenn.) 1918D-752. (Annotated)

9. Under Pub. Acts. 1911, c. 58, requiring that if a child brought before the juvenile court is probably guilty of murder in either degree, he shall be turned over to the county authorities to be proceeded against according to criminal law, the juvenile court has no jurisdiction of an infant alleged to have committed homicide if the judge thinks he is probably guilty. *Juvenile Ct. v. State* (Tenn.) 1918D-752. (Annotated)

10. Showing of Jurisdiction on Record.—The juvenile court is a court of special and limited jurisdiction, and its judgments or decrees should show the facts upon which its jurisdiction rests, such as the age of the child, the nature of the proceedings, the service of notice, and the statutory circumstances of delinquency. *Juvenile Ct. v. State* (Tenn.) 1918D-752. (Annotated)

b. Nature of Proceedings.

11. Proceedings in the juvenile court are not criminal in their nature, and are not instituted to punish the child, but to provide

for his welfare. *Juvenile Ct. v. State (Tenn.)* 1918D-752. (Annotated)

c. Notice to Parent.

12. In a proceeding under Pub. Acts. 1911, c. 58, § 10, on arrest of an infant for homicide, the juvenile court proceedings are not void, for failure to give mother of the boy notice where she is present at the hearing and is examined as a witness, since she thereby enters her appearance and waives the statutory requirement of notice. *Juvenile Ct. v. State (Tenn.)* 1918D-752.

(Annotated)

d. Review.

13. Proceedings in the juvenile court must be reviewed in the circuit court by certiorari. *State v. West, (Tenn.)* 1918D-749.

14. Habeas corpus.—Where the juvenile court entered a judgment that a child was delinquent, questions determined in such a proceeding cannot be again reviewed in habeas corpus by the mother of the child, assuming that the proceedings of the juvenile court are valid, since the question of the child's custody is *res adjudicata*. *Juvenile Ct. v. State (Tenn.)* 1918D-752.

(Annotated)

15. Under Thompson's Shannon's Code, § 5503, giving authority to any judge of the circuit, common law, or criminal courts, or to any chancellor to issue a writ of habeas corpus, where the juvenile court, in a proceeding under Acts 1911, c. 58, entered a judgment awarding custody of a child, the questions determined in such proceeding cannot be again litigated in a habeas corpus proceeding, by the same parties, on the same state of facts. *State v. West (Tenn.)* 1918D-749.

(Annotated)

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Defamation by inference, see **LIBEL AND SLANDER**, 2.

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See **INDICTMENTS AND INFORMATIONS**.

INHERITANCE TAXES.

See **TAXATION**, 52-58.

INITIATIVE AND REFERENDUM.

Injunction against submission of legislative act, see **INJUNCTIONS**, 1-3.

1. Determination of validity of initiated ordinance.—The constitutionality of a municipal ordinance which is to be presented to the voters for adoption will not be determined before it is adopted. *Pitman v. Drabell (Mo.)* 1918D-601.

2. Validity of charter provision.—Const. art. 9, § 22, amendment of 1902, relating to the charter of St. Louis, declares that such charter shall be in harmony with and subject to the constitution and laws of the state, and shall provide for a chief executive and "at least one house of legislation," to be elected by general ticket. Const. art. 5, § 57, amendment of 1908, provides for the initiative and referendum. New charter St. Louis, art. 5, §§ 1-6, gives the people of the city the right to legislate by ballot if the one house of legislation fails to act upon certification to it of petitions showing measures which the electorate desire adopted. The charter provided a single house of legislation. It is held that in view of the constitutional provision as to initiative, and the fact that by Laws 1913, p. 443, § 29, initiative powers were given to cities of the second and third class, the charter of the city of St. Louis was not invalid because containing such initiative provision; the single "house of legislation" required by the constitution being given powers of legislation in the first instance. *Pitman v. Drabell (Mo.)* 1918D-601.

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To test validity of grant of liquor license, see **INTOXICATING LIQUORS**, 1-3.

1. Subjects of Relief.

- a. Municipalities and Public Officers.

1. Submission of legislative act.—Taxpayers who object to the submission of a legislative act to referendum vote on the ground that the constitutional amendment appearing in Laws 1914, c. 520, providing for initiative and referendum is invalid, do not, where the question is to be submitted at the general election and the expense will be slight, suffer any irreparable injury entitling them to an injunction. *Power v. Ratliff (Miss.)* 1918E-1146.

2. A game warden appointed under Laws 1916, c. 99, cannot, on the theory that he is entitled to the emoluments of his office and that a referendum of the act to the voters will work irreparable injury, secure an order enjoining submission on the theory that the constitutional amendment found in Laws

1914, c. 520, providing for initiative or referendum was void, for the law may be upheld by the voters, and if repealed the warden can then attack the repeal. *Power v. Ratliff* (Miss.) 1918E-1146. (Annotated)

3. Though the constitutional amendment found in Laws 1914, c. 520, providing for initiative and referendum is void, a referendum election cannot be enjoined on the theory that if the legislation be repealed the repeal will be invalid, but the proper procedure is to take appropriate action to prevent the execution of any proposition voted upon, for the question of the validity of legislation is not one for the courts, until the legislation is completed, and until then the courts cannot determine whether the proper forms have been pursued, for an attempt by injunction to prevent a referendum election might well violate the right of the people to peaceably assemble for political purposes. *Power v. Ratliff* (Miss.) 1918E-1146. (Annotated)

b. Civil Actions and Proceedings.

4. Another action pending.—Complainant brought a suit in equity in a federal court to obtain a construction of his father's will and a decree adjudging him to be entitled to the entire beneficial interest in the estate. The bill made defendants the trustee under the will and a nephew and niece of testator who were alleged to claim an interest as heirs at law. It also averred that there might be other collateral heirs, but, if so, they were unknown to complainant. The answer of the two latter defendants set up their claims, and alleged on information and belief that there were other collateral heirs having like interests, but that their names were unknown to the answering defendants. The case was contested, and resulted in a decree in accordance with the prayer of the bill, and directing an accounting by the trustee to complainant. Before such accounting a suit was brought in a state court by a large number of persons against complainant and the trustee seeking to establish the right to the estate in themselves and other collateral heirs. It is held that the issues sought to be raised in such suit were the same as those litigated and determined by the federal court; that the jurisdiction of the subject-matter first acquired by that court was exclusive, and that complainant was entitled to an injunction to restrain the prosecution of the suit in the state court. *McClelland v. Rose* (U. S.) 1918C-341.

5. Against execution sale.—A sale upon execution will be enjoined in equity when it would constitute a cloud on the title of realty. *Townsend v. Chamberlain* (Ore.) 1918C-330. (Annotated)

6. An action can be maintained by the owner of real property to enjoin its sale under an execution issued on a judgment against another person in an action to which the owner of the property was not a party. *Yount v. Hoover* (Kan.) 1918C-148. (Annotated)

7. Under the statute, an action may be

maintained to restrain a sale under execution if the deed of the officer who sells will not pass title, and will only throw a cloud upon the title of the plaintiff. *Harris v. Carolina Distributing Co.* (N. C.) 1918C-329. (Annotated)

8. An injunction should not be granted by the chancery court to prevent the issuing of execution based upon a judgment at law, unless the facts show the clearest and strongest reasons for the interposition of the court of chancery. *Welch v. Hannie* (Miss.) 1918C-325. (Annotated)

9. Adequate remedy at law.—The court erred in granting the injunction. When that part of the petition which was based upon the theory that the *fi. fa.* (against the enforcement of which injunction was sought) was a cloud upon the title of plaintiff was stricken upon demurrer, to which ruling there was no exception, the only purpose that an injunction could serve would be to prevent enforcement of the execution by levy; and relatively to this branch of relief sought, the plaintiff will have an adequate remedy at law, when a levy of the execution is actually made, by filing a claim as provided by statute. *Douglas v. Jenkins* (Ga.) 1918C-322. (Annotated)

c Criminal Proceedings.

10. Against enforcement of penal statute.—The prosecution and punishment of crime will not be restrained by a court of chancery, except that equity has jurisdiction to restrain the institution of prosecutions under unconstitutional or void statutes or local ordinances, when property rights would be irreparably injured, and the other elements necessary to support cognizance by equity are present, since private personal and property rights will be protected by injunction from irreparable and unlawful injury. *Shuman v. Gilbert* (Mass.) 1918E-793. (Annotated)

11. A bill by six merchants, firms, and corporations, which alleged that defendant, chief of police of a city, was threatening to prosecute them for violation of a statute prohibiting hawking and peddling, though they had not violated it, did not make a case for equitable relief by injunction against the chief of police, but fell within the general principle that courts of equity will not enjoin the institution of prosecutions from alleged crimes. *Shuman v. Gilbert* (Mass.) 1918E-793. (Annotated)

12. Injury to business.—Simply that one is in business and may be injured in respect thereto by prosecution for an alleged crime is no sufficient reason for asking a court of equity, in suit to enjoin the officer from prosecuting, to ascertain in advance whether the business as conducted is in violation of a penal statute. *Shuman v. Gilbert* (Mass.) 1918E-793. (Annotated)

13. Multiplicity of suits.—A complaint by six merchants, firms, and corporations, alleging the possibility that complaints may be lodged against them under a statute prohibiting hawking and peddling, which they have not violated, does not make out a case

of multiplicity of prosecutions, justifying injunction against the officer who would bring them. *Shuman v. Gilbert* (Mass.) 1918E-793. (Annotated)

2. Actions for Injunctions.

14. Parties.—The judgment creditor is not a necessary party in an action to enjoin a sheriff from selling the property of a third person under an execution issued on a judgment in an action to which such third person was not a party. *Yount v. Hoover* (Kan.) 1918C-148. (Annotated)

15. The state officials whose duty and intention it is to tabulate the returns and promulgate the result of an election in which a special and local statute appears to have been adopted by a majority vote of the electors of a municipality affected by the statute, are the proper defendants in an injunction suit by the municipal corporation to prevent the law from going into effect, on the ground that it violates the constitution. *Gretna v. Bailey* (La.) 1918E-566.

16. Pleading.—Before a court of chancery will enjoin the issuing of an execution on a default judgment at law, the complainant must allege in his bill facts showing a good and meritorious defense to the action; it not being enough to merely allege the conclusion of law. *Welch v. Hannie* (Miss.) 1918C-325. (Annotated)

17. In an action to enjoin the issuing of execution based upon a default judgment at law, a statement of complainant's counsel that complainant had a good and meritorious defense to the action at law is but a legal conclusion of the attorney, and not admissible. *Welch v. Hannie* (Miss.) 1918C-325. (Annotated)

18. Effect of demurrer.—In a complaint seeking to enjoin an officer from enforcing a statute against complainants, allegations respecting the course of law and proceedings in court in the commonwealth, assuming that complainants, though plainly innocent of any infraction of law, will be found guilty by the district and superior courts, are not admitted by demurrer. *Shuman v. Gilbert* (Mass.) 1918E-793. (Annotated)

19. Evidence.—In a suit to enjoin an execution, the validity of the judgment turned upon the question of fact whether some five years before a previous execution was issued on the 5th day of March, 1908, prior to the time the judgment would have become dormant. The execution was dated in the following manner: "This 4 5 day of May Mch 1908." The appearance docket, the execution docket, and the indorsement on the back of the execution showed that it was issued March 5, 1908. The body of the execution recited that it was returnable May 4, 1908, and the sheriff's return stated that he received it March 5, 1908. Held, that the evidence sustained the finding that the execution issued March 5, 1908. *Sparks v. Martin* (Kan.) 1918C-324. (Annotated)

20. In such an action, the records in the office of the clerk of the district court showing the issuance of an execution cannot be

impeached by testimony of a witness that in a conversation with the deputy clerk of the district court, subsequent to the date when the judgment would have become dormant, the clerk stated to him that no execution on the judgment had issued. *Sparks v. Martin* (Kan.) 1918C-324. (Annotated)

3. Temporary Injunction.

21. Damages for wrongful issuance.—Duty to minimize.—Where one enjoined from fencing a roadway finally prevailed and it appeared that he could have moved his fence back pending litigation for \$75, it was his duty to do so, and he cannot obtain \$907 damages on the injunction bond for damages from loss of the use of fields left open, it being his duty to minimize the damages as much as he reasonably could. *Johnson v. Brown* (Tenn.) 1918C-672. (Annotated)

4. Injunction Bond.

22. Summary judgment.—In a suit to foreclose a mortgage on timber lands, where the mortgagor, to prevent an injunction against cutting timber, has given a bond conditioned on paying any judgment rendered against it, a decree, that the mortgagee shall recover of the mortgagor and the surety on the bond the amount of the mortgage, and have execution against them for any deficiency after the sale of the property, is not merely an ascertainment of the amount due prior to sale, but is a "final decree" disposing of all the issues, which fixes the liability of the surety on the bond. *United States Fidelity, etc. Co. v. Burke* (U. S.) 1918C-93. (Annotated)

23. In a proceeding to foreclose a mortgage on timber land, the court has jurisdiction over the surety on a bond given to prevent injunction against the cutting of timber, and can render judgment against the surety for the deficiency after notice to the surety of application for judgment. *United States Fidelity, etc. Co. v. Burke* (U. S.) 1918C-93. (Annotated)

INNKEEPERS.

1. Liability for insult to guest.—In an action by a guest in defendant's hotel, where the evidence shows a wrongful invasion of plaintiff's room, a violation of his rights of privacy, and humiliation suffered on account of the removal of his effects therefrom, damages for humiliation and indignity may be awarded. *Florence Hotel Co. v. Bumpas* (Ala.) 1918E-252. (Annotated)

2. Burden of justifying ejection.—Where one has shown himself admitted as a guest, the burden is on the innkeeper to justify his ejection. *Florence Hotel Co. v. Bumpas* (Ala.) 1918E-252.

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Necessity for writ of inquiry in justice's court, see JUSTICES OF THE PEACE, 3, 4.

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 In action under federal employer's liability act, see **MASTER AND SERVANT**, 35.
 Objections, see **APPEAL AND ERROR**, 98.

1. Defining terms used.—Where the court uses the words "fraud" and "fraudulently" in its instructions, it is not necessary to define them, since they are not of technical significance, especially where neither party requests a definition. *Smead v. Stearns* (Ia.) 1918C-745.

2. Verbal inaccuracies.—Verbal inaccuracies in a charge, where it correctly and fairly presents the law as a whole, are not ground for reversal. *McCue v. State* (Tex.) 1918C-674.

3. Abstract instruction.—An abstract instruction is properly refused. *Com. v. John T. Connor Co.* (Mass.) 1918C-337.

4. Misleading request.—An instruction which is misleading and confusing in the extreme is properly refused. *Rosman v. Travelers' Ins. Co.* (Md.) 1918C-1047.

5. Cautionary instruction.—Refusal of a cautionary instruction is within the discretion of the trial court. *Childers v. Brown* (Ore.) 1918D-170.

6. It is proper to give cautionary instructions relative to the consideration of verbal admissions; but if given they should be so framed as not to disparage or minimize their natural and reasonable effect as items of proof. *Blume v. Chicago, etc. R. Co.* (Minn.) 1918D-297. (Annotated)

7. Disregard of immaterial testimony.—It is the duty of the court to instruct the jury to disregard immaterial testimony elicited with such as is material. *Harlow v. Perry* (Me.) 1918C-37.

8. Disregarding theory supported by evidence.—A binding instruction is properly rejected which excludes the theory of one of the parties, and which the evidence tends in an appreciable degree to support. *Parkersburg, etc. Sand Co. v. Smith* (W. Va.) 1918E-449.

9. Request not based on evidence.—An instruction that the defendant, in an assault and battery case, is not liable for damages caused by aggravation of the injury due to his own neglect, is proper enough in the abstract, but the refusal to give such an instruction in this case was not error, since there was no sufficient evidence to sustain a finding of such neglect. *Patterson v. Blatti* (Minn.) 1918D-63.

10. In an action against a railway for injuries, where, under all the evidence, there was no material issue of fact for the jury to determine on the question of defendant's negligence, error in charging the doctrine of *res ipsa loquitur* is harmless. *Memphis St. R. Co. v. Cavell* (Tenn.) 1918C-42.

11. Requests given in substance.—It is enough that requested instructions are given in substance by the court. *Perry v. Deamond Ice, etc. Co.* (Wash.) 1918C-891.

12. Requested instructions, given in substance, are properly refused. *Childers v. Brown* (Ore.) 1918D-170.

13. The refusal of a requested instruction is not error; where it is given by the granting of another requested instruction. *Rosman v. Travelers Ins. Co.* (Md.) 1918C-1047.

14. Refusal of a requested instruction on reasonable doubt is not reversible error where other portions of the charge covered the ground. *Holland v. State* (Ark.) 1918C-578.

15. Error cured by other instructions.—Where accused's defense was alibi, the error in a charge on principal, which did not require the jury to find that accused was personally present at the killing, must be disregarded, where other paragraphs of the charge directed acquittal in case of a reasonable doubt as to whether accused was present at the killing. *McCue v. State* (Tex.) 1918C-674.

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See **ACCIDENT INSURANCE**; **BENEFICIAL ASSOCIATIONS**; **FIRE INSURANCE**; **LIFE INSURANCE**; **MARINE INSURANCE**.

As mitigation of damages in action for personal injury, see DAMAGES, 1.

Declarations and admissions of insured, see ADMISSIONS AND DECLARATIONS, 3-6.

Implied trust in proceeds of insurance on buildings constructed by tenant, see TRUSTS AND TRUSTEES, 6.

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Validity of provision against interest in contract of insurance, see INTEREST, 1.

1. Insurance Agents and Brokers.

a. In General.

1. Representations inconsistent with policy.—The general agent of a credit insurance company, though authorized to make contracts and issue insurance policies, and to vary the terms of the policies and bind his company, though contrary to the express terms of his contract of employment, nevertheless cannot, by contemporaneous oral representations, override the express agreement for insurance made by plaintiffs, and contained in the written applications signed by one of them. *Cauman v. American Credit Indemnity Co. (Mass.) 1918E-841.*

2. Whatever the apparent authority of a special and a general agent of a credit insurance company, persons who attempt to secure credit insurance are charged with knowledge that no representations or agreements made by the two agents will bind the insurance company, if contrary to the terms of the application and of the policies annexed and referred to in the applications. *Cauman v. American Credit Indemnity Co. (Mass.) 1918E-841.* (Annotated)

3. Authority of agent.—Where the agent of a credit insurance company represented himself to one who desired to secure insurance as a special agent, the person desiring insurance was bound to ascertain the nature and extent of his authority. *Cauman v. American Credit Indemnity Co. (Mass.) 1918E-841.*

4. The limitations placed upon the authority of the general agent of a credit insurance company, contained in the written agreement under which he was employed, do not affect the rights of third persons, who, without knowledge of such limitations, deal with him within the apparent scope of his authority. *Cauman v. American Credit Indemnity Co. (Mass.) 1918E-841.*

b. Liability to Insurer.

5. Failure to cancel policy.—Insurance agents, sued by their company for loss from not canceling policies as directed by it, cannot deny that it was their duty to do so, they having undertaken to do it, when, had they refused, it might seasonably have been done by the company. *National Union F. Ins. Co. v. Dickinson (Wash.) 1918C-1042.* (Annotated)

6. Binding effect of judgment on policy.—Insurance agents liable to their company for any loss on policies, because they did not cancel them as directed by it, are bound by

the judgment against the company in the action on the policies, on the question there litigated whether proper proofs of loss were made, defense of such action having been tendered them by the company, though they, while actively assisting, declined to assume the defense. *National Union F. Ins. Co. v. Dickinson (Wash.) 1918C-1042.* (Annotated)

7. Evidence.—Evidence in action by an insurance company against its agents is held to authorize a finding that they had not canceled policies as directed by it, or even used ordinary care to do so. *National Union F. Ins. Co. v. Dickinson (Wash.) 1918C-1042.* (Annotated)

2. Statutory Regulations.

8. Validity of statute creating board.—Chapter 174, Sess. Laws 1915, p. 340, creating a state insurance board and providing for the regulation and control of rates of premiums on insurance, and for other purposes therein specified, is not in violation of any rights of the companies affected thereby doing business in this state secured to them by the fourteenth amend. to the Constitution of the United States, and is within the legitimate police power of the state. *Insurance Co. of North America v. Welch (Okla.) 1918E-471.* (Annotated)

9. The business of insurance affected by the provisions of said act is of such nature and affected with such a public interest as to justify legislative regulation thereof and of the rates charged by the companies engaged in such business. *Insurance Co. of North America v. Welch (Okla.) 1918E-471.* (Annotated)

10. It is within the power of the legislature to create a state insurance board, and to require every fire, tornado, and plate glass insurance company and every insurance company granting insurance against the liability of employers to file with said board a schedule of rates charged by it for such risks, and to prohibit a change in such rates except after ten days' notice to said board of such contemplated change, and authorizing said board, when it shall determine that any rate is excessive or unreasonably high, or that said rate is inadequate to the safety or soundness of the company granting the same, to direct said company to file a higher or lower rate, commensurate with the risk and further requiring that in every case the rate shall be reasonable, when provision is made for a review of the orders of said board by the courts. *Insurance Co. of North America v. Welch (Okla.) 1918E-471.* (Annotated)

11. Section 174, Sess. Laws 1915, p. 340, is not violative of the provisions of sections 22, 23, and 24 of article 6 of the constitution, creating the insurance department and the office of insurance commissioner, nor does such act deprive the insurance commissioner of any powers or duties conferred upon him by the constitution. *Insurance Co. of North America v. Welch (Okla.) 1918E-471.* (Annotated)

12. The grant to the legislature of specific authority by section 19, art. 9 of the constitution to vest in the corporation commission additional powers and duties in connection with the visitation, regulation, or control of corporations, or with prescribing and enforcing rates and charges to be observed in the conduct of any business, where the state has the right to prescribe the rates and charges in connection therewith, does not deprive the legislature of its power to regulate and control such matters or to create the state insurance board and vest it with the powers enumerated in said chapter 174, Sess. Laws 1915. *Insurance Co. of North America v. Welch* (Okla.) 1918E-471. (Annotated)

13. Exempting domestic mutual fire insurance companies and reciprocal associations and mutual insurance companies and reciprocal associations doing business in this state from the provisions of said act does not render such legislation invalid as to other insurance companies, as denying them the equal protection of the laws. *Insurance Co. of North America v. Welch* (Okla.) 1918E-471. (Annotated)

14. The title of the act is sufficiently comprehensive to embrace the various provisions thereof. *Insurance Co. of North America v. Welch* (Okla.) 1918E-471.

15. Provision having been made for an appeal to this court from any regulation, order or rate adopted by said board, said provision gives a speedy and adequate remedy, and an injunction will not lie to restrain said board from proceeding in a matter within its lawful jurisdiction. *Insurance Co. of North America v. Welch* (Okla.) 1918E-471. (Annotated)

3. Construction of Policy Generally.

16. A policy of insurance being a written contract, its terms must be given a reasonable construction, and not stretched beyond their evident meaning. *Rocci v. Massachusetts Accident Co.* (Mass.) 1918C-529.

17. When the language used in a policy is unambiguous, its usual and ordinary meaning should be attributed to it. *Wisconsin Zinc Co. v. Fidelity, etc. Co.* (Wis.) 1918C-399.

18. Construction against insurer.—Policies will be construed most strongly against the company and in favor of the insured. *Eminent Household of Columbian Woodmen v. Bunch* (Miss.) 1918C-110.

19. Obscure or equivocal words and phrases in a policy of insurance must be construed strongly against the insurer; but the rule does not apply where the words are so plain as to leave no room for construction. *Rocci v. Massachusetts Accident Co.* (Mass.) 1918C-529.

20. Understanding of insured.—Where reasonable doubt exists as to meaning of insurance contract, the construction that will carry out the insured's understanding should be adopted, where his understanding is based upon representations made by the company. *Forman v. Mutual L. Ins. Co.* (Ky.) 1918E-880.

4. Warranties and Representations.

21. Amount to be realized from policy.—In action by an insured to recover difference between surplus as computed by defendant insurance company and amount guaranteed when policy was issued, evidence is held to be sufficient to show that insured was induced to take out policy by insurer's representations as to the amount of surplus he would receive. *Forman v. Mutual L. Ins. Co.* (Ky.) 1918E-880.

5. Waiver of Provisions.

22. Pleading—Departure.—An insured cannot declare upon the policy and, when charged by the insurer's answer with shortcomings, reply that such omissions were waived. *Waller v. New York Ins. Co.* (Ore.) 1918C-139.

6. Liability Insurance.

a. Construction of Contract.

23. Indemnity against liability for malpractice.—Policy insuring against loss from liability by law for damages on account of bodily injuries or death suffered in consequence of error, mistake, or malpractice in assured's profession of dentistry, or by any assistant of the insured while acting under his instructions, is neither technical nor ambiguous, and its language must be given the legal, natural, and ordinary meaning. *Betts v. Massachusetts Bonding, etc. Co.* (N. J.) 1918E-520. (Annotated)

24. Persons entering into dentist's indemnity insurance policy will be presumed to have contracted with full knowledge of the legal effect of their acts under the laws relating to the practice of dentistry. *Betts v. Massachusetts Bonding, etc. Co.* (N. J.) 1918E-520. (Annotated)

25. An insurer, issuing an indemnity policy to a dentist to protect him in actions for his alleged malpractice, may rely on the full performance of the dentist's duties under the law. *Betts v. Massachusetts Bonding, etc. Co.* (N. J.) 1918E-520. (Annotated)

26. Malpractice of unlicensed assistant.—A dentist cannot recover on an indemnity policy for a claim arising from malpractice of his assistant, who was unlicensed when in the application he held his assistant out as a licensed dentist. *Betts v. Massachusetts Bonding, etc. Co.* (N. J.) 1918E-520. (Annotated)

27. Dentist's indemnity policy, avoiding liability for any claim against the assured or his assistant arising from violation of any law or ordinance on the part of the assured, creates no liability for a claim arising from injuries to a patient from an unlicensed and unregistered assistant, regardless of whether the violation of law was the permanent cause of the injury. *Betts v. Massachusetts Bonding, etc. Co.* (N. J.) 1918E-520. (Annotated)

28. Under policy indemnifying dentist from liability for alleged malpractice of himself or assistant while acting under his in-

structions, the insurer is not liable for a judgment obtained by a patient who was operated on and injured by an unregistered and unlicensed assistant acting in violation of the dentist's instructions, in view of 2 Comp. St. 1910, pp. 1911, 1913, 1915, §§ 1, 8, and 12, stating the requisites of practicing dentistry. *Betts v. Massachusetts Bonding, etc. Co.* (N. J.) 1918E-520. (Annotated)

29. That such assistant was duly qualified in another state does not make his act in practicing in New Jersey without a license and without registration any the less a violation of law, so as to affect the case. *Betts v. Massachusetts Bonding, etc. Co.* (N. J.) 1918E-520. (Annotated)

30. Employers' liability insurance.—Power of insurer to control settlement.—Under a policy indemnifying an employer for injury to an employee to an amount not exceeding \$5,000 on a single claim, agreeing to pay the expenses incurred in defending a suit against the insured, providing that no action could be maintained by the insured against the insurer unless begun to recover a loss defined by the policy after final judgment rendered in an action by the injured employee against the insured employer, in which the insured agreed not to voluntarily assume any liability nor interfere in any negotiations or legal proceedings conducted by the insurer, nor, except at its own expense, to settle any claim or to incur any expense without the consent of the insurer, except for imperative surgical relief, and in which the insurer reserved the right to settle any claim or suit, the insurer did not obligate itself to settle a claim which could be settled for \$5,000 or less, and so relieve the insured of liability; and hence, where the insured suffered a judgment for \$12,500 and the insurer contributed \$5,000, the insured cannot recover the balance of \$7,500 which he was required to pay in satisfaction of the judgment. *Wisconsin Zinc Co. v. Fidelity, etc. Co.* (Wis.) 1918C-399. (Annotated)

31. Under such policy, the insurer is not made the agent of the insured for the purpose of making a settlement, but has the right to consider its own interests as paramount to those of the insured, and to decide whether they will be best subserved by settling or contesting the claim; and hence there can be no breach of such duty so as to lay a foundation for the insured's action in tort for the insurer's failure to settle without trial. *Wisconsin Zinc Co. v. Fidelity, etc. Co.* (Wis.) 1918C-399. (Annotated)

32. Under such policy, there is no liability on the part of the insurer until a judgment is recovered by an employee and paid by the insured. *Wisconsin Zinc Co. v. Fidelity, etc. Co.* (Wis.) 1918C-399. (Annotated)

33. In such a policy the parties have a right to insert such provisions as they see fit so long as they do not contravene public policy, and the provision that the insurer shall have the exclusive right to settle claims, which right may in good faith be exercised to its full extent by the insurer for

its own benefit and advantage, is valid. *Wisconsin Zinc Co. v. Fidelity, etc. Co.* (Wis.) 1918C-399. (Annotated)

34. As to such policies, the courts have no power to add or subtract anything from the contract actually made, but must so interpret it as to carry out the intention of the parties. *Wisconsin Zinc Co. v. Fidelity, etc. Co.* (Wis.) 1918C-399. (Annotated)

35. Where the insurer in a casualty policy assumes the duty of defending and negligently breaches such duty, the insured has a remedy. *Wisconsin Zinc Co. v. Fidelity, etc. Co.* (Wis.) 1918C-399. (Annotated)

36. Under a policy indemnifying an employer against loss from personal injury to his employees, wherein the insurer agreed to defend, in the name and on behalf of the insured, any suit against the insured for damages on account of personal injury to his employees, and reserved the right to settle any claim or suit, and wherein the insured agreed not to voluntarily assume any liability, or to interfere with proceedings conducted by the insurer or to settle any claim, the power of settlement given to the insurer may not be used for the purpose of fraud or oppression or be exercised in bad faith. *Wisconsin Zinc Co. v. Fidelity, etc. Co.* (Wis.) 1918C-399. (Annotated)

b. Actions.

37. Allegations of bad faith of insurer.—Allegations of a complaint, in an action by an employer insured under a policy indemnifying him for loss from personal injury to his employees, that the insurer knew the hazards attending litigation against an employer and the liability of suffering a large judgment, that it was bound to settle a claim before trial, and that, instead of acting on behalf of the insured, it acted in its own interests and in bad faith toward the insured, and failed to settle, whereby a larger judgment was obtained, requiring the insurer to pay the maximum of the claim and the insured to pay the excess of the judgment, liberally construed on demurrer, and in view of the failure to move to make it more definite and certain, sufficiently allege bad faith. *Wisconsin Zinc Co. v. Fidelity, etc. Co.* (Wis.) 1918C-399. (Annotated)

39. Declaring on "binder."—Where the petition discloses that ad interim employers' liability insurance was issued for ten days from the date of the "binder" and "pending the issue of a regular policy at the rate and subject to limits of liability stated therein, and subject also to the agreements and conditions of the policy form E. L. 20, . . . as issued by this company, . . ." and the plaintiff declares upon the "binder" alone, without setting forth the policy subsequently issued pursuant to the terms of the "binder," and declaring thereupon as a part of the contract of insurance, a demurrer to the petition should be sustained. *Aetna L. Ins. Co. v. Bradford* (Okla.) 1918C-373. (Annotated)

7. Automobile Insurance.

39. Liability insurance.—Plaintiff having been run down and injured by defendant's motorcar, and defendant having a policy protecting him from loss, after recovering judgment brought proceedings to reach and apply the insurance money to the satisfaction of the judgment. The policy declared that it did not cover loss from liability for any suit based on injuries or death, caused while the motorcar was being driven by any person under the age of sixteen years. The court found that a son of defendant under sixteen years of age had been driving the car, but that just previous to the accident defendant took the wheel from his son, telling him to get out of the way, and thereafter the son did nothing other than to sound the horn. It is held that even though defendant was found not to have been in a position favorable to the operation of the car, yet as he was the dominating mind and had removed his son, the accident was one falling within the policy. *Williams v. Nelson* (Mass.) 1918D-538. (Annotated)

40. Rights of injured person against insurer.—Under St. 1914, c. 464, permitting a judgment creditor of one insured by contract of casualty policy against loss or damages on account of bodily injury or death by accident arising from causes from which the insured is responsible to proceed, having recovered judgment for a cause covered by the contract of insurance in equity against the insured and insurer to apply insurance money to the satisfaction of the judgment; one run down by insured's motorcar may, having recovered judgment against him, proceed to that extent against the insurer, it being the manifest purpose of the statute to include such cases. *Williams v. Nelson* (Mass.) 1918D-558.

41. Where a wife was run down and injured by the motorcar of one insured against losses resulting from the operation of a car, she can, under the statute, compel application of the insurance money to the satisfaction of her judgment, but the husband, who recovered damages for the injury of his wife, cannot, for the statute is expressly limited to a judgment for "bodily injury" which does not include the husband's financial loss or loss of consortium. *Williams v. Nelson* (Mass.) 1918D-538.

42. St. 1914, c. 464, permitting a judgment creditor of one insured by contract of casualty insurance against loss on account of bodily injury of any person from causes for which the insured is responsible to proceed in equity against the insured and insurer to apply the insurance money to satisfaction of judgment, is constitutional. *Williams v. Nelson* (Mass.) 1918D-538.

43. The superior court has jurisdiction of a petition by a judgment creditor of one insured by contract of casualty insurance to reach and apply under St. 1914, c. 464, insurance money to the satisfaction of his judgment, for the court has general chancery jurisdiction, and Rev. Laws, c. 159, § 3, confers upon it jurisdiction of special equitable

suits by creditors to reach and apply property of a debtor which cannot be attached or taken on execution in actions of law. *Williams v. Nelson* (Mass.) 1918D-538.

44. The exclusive jurisdiction in equity conferred upon the supreme judicial court by Rev. Laws, c. 159, § 2, is confined to matters not within the general principles of chancery jurisprudence, and hence does not give the supreme judicial court jurisdiction over such proceeding. *Williams v. Nelson* (Mass.) 1918D-538.

8. Credit Insurance.

45. Failure to agree on terms of policy.—Where all the negotiations between the agents of a credit insurance company, and persons desirous to secure insurance, are in anticipation of a written policy or policies to be issued, which policy or policies are not issued because the parties are never able to agree on terms, no oral contract of insurance or indemnity is made. *Cauman v. American Credit Indemnity Co.* (Mass.) 1918E-841. (Annotated)

46. Failure of insured to read policy.—If an applicant for credit insurance did not see fit to read the applications or the conditions of the policies to which the applications expressly referred, the rights of the parties are not to be affected; there having been nothing to prevent him from informing himself of their contents, if he desired. *Cauman v. American Credit Indemnity Co.* (Mass.) 1918E-841. (Annotated)

47. Refusal to accept particular risk.—When a credit insurance company learns that a company whose account was sought to be insured had become bankrupt, it has a perfect right to refuse to issue any policy insuring the bankrupt company's account. *Cauman v. American Credit Indemnity Co.* (Mass.) 1918E-841. (Annotated)

9. Health Insurance.

48. Validity of provisions.—A condition in a policy of health and accident insurance, voiding it for nonpayment of premiums, is valid and self-executing. *Rocci v. Massachusetts Accident Co.* (Mass.) 1918C-529.

49. A stipulation in a policy of accident and health insurance that there can be no recovery except during continuous confinement within the house is reasonable and valid, where the rate of premium is based upon the unlikelihood of such confinement. *Rocci v. Massachusetts Accident Co.* (Mass.) 1918C-529. (Annotated)

50. Conflict between policy and by-law.—Where a health policy provided that indemnity should be paid "in one sum," and a by-law provided for payment "in ten annual instalments," the policy will prevail, if it is within the power of the association under its charter or articles of organization. *Eminent Household of Columbian Woodmen v. Bunch* (Miss.) 1918C-110.

51. What constitutes continuous confinement to house.—Where a policy of accident and health insurance provided that there

should be no liability unless the insured was continuously confined to the house, evidence that the insured stayed two weeks in his own house, went to his sister's house and stayed two weeks, went to the city hospital for three weeks and another hospital for four weeks, went home, went to a town several miles away and entered another hospital, fails to show liability under the policy; "continuously," as used therein, meaning uninterruptedly, in unbroken sequence, without intermission or cessation, and without intervening time, and "within the house" meaning, in the absence of some exigency, within one house. *Rocci v. Massachusetts Accident Co. (Mass.)* 1918C-529. (Annotated)

52. Excuse for nonpayment of premium.—Under a condition in a policy of health and accident insurance voiding it for nonpayment of premiums, failure to pay is not excused by illness of the insured before the payment was due. *Rocci v. Massachusetts Accident Co. (Mass.)* 1918C-529.

53. Proof of sickness.—Where a policy of accident and health insurance required proof of sickness to be made within thirty days from the date of termination of the disability, and the insured made a claim covering a year's disability in good time, but the claim was valid only for the first month, failure to give the notice and proof within thirty days of the termination of the liability of the company did not forfeit the policy. *Rocci v. Massachusetts Accident Co. (Mass.)* 1918C-529.

INTENT.

To violate of local option law, see INTOXICATING LIQUORS, 17.

INTENT TO KILL.

Assault with intent to kill, see ASSAULT, 1, 2.

INTEREST.

In estimating compensation for taking of land, see EMINENT DOMAIN, 8.

Liability of public officer for interest on money in his hands, see PUBLIC OFFICERS, 14.

On advancements, see ADVANCEMENTS, 2, 3.

On legacies, see WILLS, 54, 55.

On unpaid stock subscriptions, see CORPORATIONS, 34.

1. Validity of contract provision against interest.—A provision in a contract of insurance "that in any action at law or equity, brought to enforce the collection of this certificate, or any amount alleged to be due thereunder, claimant or claimants shall not be entitled to receive or recover interest on the amount thereof," is against public policy and will not be enforced, so as to cut off interest from a judgment duly rendered against the company. Such a provision tends

to encourage, promote, and prolong litigation over a just claim, which ought not to be litigated; therefore, in principle, it comes under the condemnation of the law relating to champerty and maintenance. *Modern Brotherhood, etc. v. Bailey (Okla.)* 1918E-744.

(Annotated)

INTERNAL REVENUE.

Admissibility of evidence of possession of federal revenue stamp, in prosecution for illegal sale of liquor, see INTOXICATING LIQUORS, 12.

Admissibility of certificate showing grant of license in prosecution for illegal sale of liquor, see INTOXICATING LIQUORS, 10, 11.

INTERNATIONAL LAW.

See CONFLICT OF LAWS.

1. Suit against foreign government.—The bringing of an action by a foreign nation in a court of the United States to recover a deposit placed to its credit in a bank is not a waiver of its immunity as a sovereign from suit by other parties, and the court is without jurisdiction to permit the defendant by interpleader to substitute as defendant another party claiming a lien on the deposit as a creditor of the plaintiff, but who alleges no facts which would make it a trust fund. *Kingdom of Roumania v. Guaranty Trust Co. (U. S.)* 1918E-524. (Annotated)

2. A foreign nation at war which makes contracts in the United States for supplies or equipment for its armies does not thereby divest itself of its sovereign character and become subject to suit as a private individual. *Kingdom of Roumania v. Guaranty Trust Co. (U. S.)* 1918E-524. (Annotated)

INTERSTATE COMMERCE.

Excise tax on foreign corporation as burden on interstate commerce, see CORPORATIONS, 46.

Taxing income produced by interstate commerce as burden on interstate commerce, see TAXATION, 59.

1. Power of states.—Where commerce is entirely intrastate, the state's power to regulate is exclusive. *Western Union Tel. Co. v. Lee (Ky.)* 1918C-1026.

2. Legislation which is a mere aid to interstate commerce may be enacted by a state, although it may incidentally affect that commerce. *Western Union Tel. Co. v. Lee (Ky.)* 1918C-1026.

3. Where Congress has not assumed jurisdiction over a given subject of commerce, but may do so, in the absence of congressional action, a state may exercise its police power over the subject. *Western Union Tel. Co. v. Lee (Ky.)* 1918C-1026.

4. The silence of Congress on a subject of commerce over which it has jurisdiction, and which requires uniform regulation, is equivalent to affirmative legislation that such subject should be free from state enactments. *Western Union Tel. Co. v. Lee* (Ky.) 1918C-1026.

5. Telegraph lines or messages as interstate commerce.—The transmission of intelligence by wire is "commerce." *Western Union Tel. Co. v. Bolling* (Va.) 1918C-1036.

6. Telegraph lines are instruments of commerce, and messages transmitted over such lines constitute a portion of such commerce. *Western Union Tel. Co. v. Lee* (Ky.) 1918C-1026.

7. A telegraph message sent from one point within the state to another like point, but passing through part of another state in transit, constitutes "interstate commerce." *Western Union Tel. Co. v. Lee* (Ky.) 1918C-1026.

8. The transmission of a telegram between two points within the state over a line which passes out of the state and requires relaying the message outside of the state is "interstate commerce." *Western Union Tel. Co. v. Bolling* (Va.) 1918C-1036.

9. Federal control over telegraph lines.—By enactment of Act Cong. June 18, 1910, c. 309, 36 Stat. 544 (4 Fed. St. Ann. 2d ed. 337), making Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379, applicable to interstate telegraph messages, and giving company power to make different charges for different classes of messages, Congress intended to take control of the entire regulation of interstate telegraph lines to the exclusion of state regulation. *Western Union Tel. Co. v. Lee* (Ky.) 1918C-1026.

(Annotated)
10. Exclusion of product of child labor.—Act Sept. 1, 1916, c. 432, 39 Stat. 675 (Fed. St. Ann. Pamph. Supp. No. 8, p. 137), prohibiting the transportation in interstate commerce of the products of mines or factories in which within thirty days prior to removal children under the age of fourteen were employed, or children between the ages of fourteen and sixteen were employed or permitted to work more than eight hours a day or more than six days in any week, is invalid, and cannot be sustained as an exercise by Congress of its power to regulate commerce between the states, for the products of child labor are in themselves inherently harmless, for the act instead of being one regulating commerce, which consists of intercourse and traffic and includes the transportation of persons and property as well as the purchase, sale, and exchange of commodities, would serve to bring under federal control to the practical exclusion of the authority of the states all manufacture of articles intended for interstate shipment. *Hammer v. Dagenhart* (U. S.) 1918E-724. (Annotated)

11. Such act cannot be sustained on the theory that Congress has power to control interstate commerce in the shipment of child-made goods because of the effect of such goods in states where the evil of child labor

has been recognized by local legislation and the right to employ child labor has been more rigorously restrained than in the state of production. *Hammer v. Dagenhart* (U. S.) 1918E-724. (Annotated)

12. Act Sept. 1, 1916 (Fed. St. Ann. Pamph. Supp. No. 8, p. 137), attempting to regulate child labor in the states by prohibiting the transportation in interstate commerce of certain child-made goods, is invalid, being an invasion of the powers of the states, whose inherent power to regulate their own local affairs has never been delegated to the general government. *Hammer v. Dagenhart* (U. S.) 1918E-924. (Annotated)

INTERSTATE COMMERCE COMMISSION.

Effect of filing form of bill of lading with commission, see CARRIERS OF GOODS, 4.

INTOXICATING LIQUORS.

1. Licenses, 129.

2. Offenses:

- a. Furnishing Prescription, 130.
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3. Prosecutions:

- a. Evidence:
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Meaning of term "liquor saloon," see WORDS AND PHRASES, 7.

Refusal of license as releasing liability of lessee; see LANDLORD AND TENANT, 7.

Saloon as place of public accommodation within statute forbidding denial of rights on account of race or creed, see CIVIL RIGHTS, 1, 2.

Unlawful sale of liquor on premises as barring recovery for rent, see LANDLORD AND TENANT, 12-15.

1. Licenses.

1. Injunction against grant of license.—A railroad company maintaining a passenger depot is held on the evidence to sustain such special damage from the sale of intoxicants immediately adjacent thereto, to entitle it to sue for an injunction to test the validity of the grant of a license at that location. *Carr v. Washington, etc. R. Co.* (D. C.) 1918D-818.

2. The right to certiorari to test the validity of the grant of a liquor license is not so clear and plain as to preclude resort to a suit for an injunction for that purpose. *Carr v. Washington, etc. R. Co.* (D. C.) 1918D-818.

3. The right to prosecute criminally a person to whom a liquor license has been granted illegally does not preclude relief by injunction to a person sustaining special damage from the sale of liquor under the license.

Carr v. Washington, etc. R. Co. (D. C.) 1918D-818.

2. Offenses.

a. Furnishing Prescription.

4. Construction of statute.—Laws 1905, c. 123, § 1, providing that it shall be unlawful for any physician to furnish a prescription for any kind of intoxicating liquors to be used as a beverage, or for any purpose except for medicinal purposes in case of actual sickness, applies only to cases where the application for the prescription is made by some one other than the person alleged to be ill. State v. Morton (S. D.) 1918E-913.

(Annotated)

5. Who is "patient."—Laws 1905, c. 123, § 2, making it unlawful for any physician to furnish any person a prescription for any kind of intoxicating liquors except to patients of such physician, where the patient is afflicted with some disease and his condition is such that in the opinion of the physician, the taking of intoxicating liquors would be beneficial, applies where a person himself seeks the advice of the physician and states his ailments, and such person is a "patient," within the meaning of the act. State v. Morton (S. D.) 1918E-913.

(Annotated)

6. Good faith.—In prosecution of physician for furnishing prescription for intoxicating liquors under Laws 1905, c. 123, the essence is whether or not a physician acted in good faith in giving the prescription to his patient. State v. Morton (S. D.) 1918E-913.

(Annotated)

7. Burden of proof.—In prosecution under Laws 1905, c. 123, against physician for furnishing prescription for intoxicating liquors to a patient, the burden of proof is upon the state to show beyond a reasonable doubt a violation of the statute. State v. Morton (S. D.) 1918E-913.

(Annotated)

b. Importation of Liquor.

8. What constitutes.—Intoxicating liquors are introduced into the state, within Const. art. 23, § 1, providing that intoxicating liquors shall not be introduced into the state under any pretense, when the liquors have been intentionally transported into the state as a result of a transaction set on foot by a single impulse, and operated by an uninterrupted force, no matter how long a time it may occupy, nor the distance over which it may be exerted, either within or without the state, so long as the transaction results in bringing the liquor within the territorial jurisdiction of the state. Reynolds v. State (Ariz.) 1918D-879.

(Annotated)

9. Where offense committed.—The offense of introducing liquors into the state is not completed till they reach their destination, but the offense is committed in every portion of the state over which they are transported, and if the route is in part in one county, and in part in another, the offense is committed in part in each county, and may be prosecuted in either county under Pen. Code 1913, par.

§12, providing that when a public offense is committed in part in one county and in part in another, or the acts or effects thereof requisite to consummation of the offense occur in two or more counties, the jurisdiction shall be in either county. Reynolds v. State (Ariz.) 1918D-879. (Annotated)

3. Prosecutions.

a. Evidence.

(1) Admissibility.

10. Certificate showing federal license.—The provisions of the Act No. 40 of 1908 that, in all criminal prosecutions for the offense of retailing intoxicating liquor in violation of law, the state may introduce in evidence, in support of the charge, a certificate from the internal revenue collector showing that a United States internal revenue license or permit was issued to the person on trial, and that such certificate shall be prima facie evidence that the person is guilty of the offense of retailing intoxicating liquor in violation of law, is unconstitutional and invalid, because it contravenes the provision in article 9 of the constitution of this state that "the accused in every instance shall have the right to be confronted with the witnesses against him." State v. Wilson (La.) 1918D-789.

(Annotated)

11. A certified copy of a record kept in the office of the collector of internal revenue is not what the Act No. 40 of 1908 provides shall be admissible in evidence in a prosecution for retailing intoxicating liquor in violation of law and be prima facie evidence of the guilt of the party accused. A certified copy of such a record would not, of itself, prove that anyone had sold intoxicating liquor, and would not alone justify the conviction of a person accused of selling intoxicating liquor in violation of law. State v. Wilson (La.) 1918D-789.

(Annotated)

12. Possession of federal revenue stamp.—Under Local Option Law, § 17 (Hurd's Rev. St. 1913, c. 43, § 41), a certified copy of internal revenue special tax stamp is admissible, though with no evidence of posting, to show the character of the liquor sold. People v. Brown (Ill.) 1918D-772.

13. Copies of waybills.—In a prosecution for illegal liquor selling, copies of original waybills are competent as original evidence where such copies are signed as receipts by defendant, who was not only an individual dealer, but also an express company. People v. Brown (Ill.) 1918D-772.

2. Sufficiency.

14. The evidence is held to be insufficient to show that accused issued a prescription for intoxicating liquors intended to be used as a beverage in violation of Laws 1905, c. 123. State v. Morton (S. D.) 1918E-913.

15. Proof of corpus delicti.—The corpus delicti of the offense of introducing liquor into the state may be established by circum-

stantial evidence. Reynolds v. State (Ariz.) 1918D-879. (Annotated)

16. In a prosecution for introducing liquor into the state, evidence held sufficient to establish the corpus delicti, independent of admissions and statements by accused. Reynolds v. State (Ariz.) 1918D-879.

(Annotated)

b. Instructions.

17. As to Intent.—An instruction that it was not necessary to prove defendant knowingly and wilfully violated the Local Option Law, but only that he did violate it, is not objectionable. People v. Brown (Ill.) 1918D-772.

18. As to purpose of importation.—In a prosecution for introducing liquor into the state, a charge that under the law, if the evidence warrants it, the jury may find defendant guilty, for any person who introduces into the state any ardent spirits, etc., shall be guilty of a misdemeanor, is not objectionable as requiring the jury to convict even if the liquor were introduced for a lawful purpose, where no issue as to the purpose of introducing the liquor was raised at the trial. Reynolds v. State (Ariz.) 1918D-879.

(Annotated)

19. In a prosecution for introducing liquor into the state, the defendant could suffer no injury from the failure to instruct as to the defense of lawful purpose of the introduction, when the purpose he was shown to have admitted was unlawful. Reynolds v. State (Ariz.) 1918D-879.

(Annotated.)

c. Punishment.

20. Sentence not excessive.—Where defendant was active in peddling blank orders and ordering and delivering beer in violation of the Local Option Law, a sentence of \$75 and fifteen days imprisonment on each of eight counts and \$100 and fifty days on another count is within the discretion of the court. People v. Brown (Ill.) 1918D-772.

INTOXICATION.

As affecting voidability of contract, see CONTRACTS, 1.

INVITEE.

Duty owed to invitee in store, see NEGLIGENCE, 1.

INVOICE VALUE.

Definition, see WORDS AND PHRASES, 5.

IRON SAFE CLAUSE.

See FIRE INSURANCE, 10-13.

IRRIGATION.

Liability of state for damages caused by negligent operation of irrigation system, see STATES, 7.

ITEMIZED STATEMENT.

Itemized statement of account as evidence, see ACCOUNTS, 3, 4.

JEOPARDY.

See FORMER JEOPARDY.

JITNEYS.

See CARRIERS OF PASSENGERS, 19, 20.

JOINT TENANTS.

See TENANTS IN COMMON.

JOINT TORTFEASORS.

Release of joint tortfeasor, see RELEASE AND DISCHARGE, 2-7.

Injuries resulting from maintenance of wires in proximity to those of another company, see ELECTRICITY, 10.

JUDGES.

See COURTS; JUSTICES OF THE PEACE.

Affidavit of judge to supplement record on appeal, see APPEAL AND ERROR, 23.

1. Term as including justice of the peace.—Within Const. art. 7, §§ 1, 2, as amended November 8, 1910, providing that the judicial power shall be vested in the supreme court and such other courts as may be created by law, that the judges thereof shall be elected for six years, and that the courts and judicial system, except as expressly changed by the amendment, shall remain as at present till otherwise provided, a justice's court is a "court" and a justice of the peace a "judge;" the original sections providing for justices of the peace with limited judicial powers. Webster v. Boyer (Ore.) 1918D-988.

(Annotated)

JUDGMENTS.

- 1 Requisites and Validity in General, 132.
2. Conformity to Pleadings, 132.
3. Judgment Non Obstante Verdicto, 132.
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7. Res Judicata:

a. In General, 133.

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Decision or judgment of appellate court, see APPEAL AND ERROR, 104-110.

Default judgment in justices court, see JUSTICES OF THE PEACE, 1-4.

Effect of decree of annulment, see MARRIAGE, 15.

Effect of judgment against garnishee as against principal defendant, see GARNISHMENT, 3.

Effect on attachment of failure to docket judgment in lien docket, see ATTACHMENT, 6.

Faith and credit of foreign judgment, see CONFLICT OF LAWS, 5.

Finality of decree for distribution, see EXECUTORS AND ADMINISTRATORS, 16.

In quo warranto proceedings, see QUO WARRANTO, 7-9.

Lien of attorney on judgment, see ATTORNEYS, 14-16.

Matters concluded by judgment of dismissal of amended complaint, see PLEADING, 22.

Satisfaction of judgment for libel as barring suit against persons jointly liable, see LIBEL AND SLANDER, 34, 35.

Setting aside decree for distribution, see EXECUTORS AND ADMINISTRATORS, 17-20.

Settlement of judgment in violation of attorney's lien, see ATTORNEYS, 15, 16.

Summary judgment against surety in injunction bond, see INJUNCTIONS, 22, 23.

Validity of judgment against partners in action against firm, see PARTNERSHIP, 5.

1. Requisites and Validity in General.

1. Personal decree.—Where, in a suit to collect a debt secured by an alleged lien on land, the existence of the debt is established, but the lien is not, it is error to dismiss plaintiff's suit without a personal decree against the debtor. *Linn v. Collins* (W. Va.) 1918C-86.

2. Conformity to Pleadings.

2. Under Rev. Code, § 186, providing that the relief granted to a plaintiff, if there is no answer, shall not exceed that which he has demanded in his complaint, but that in other cases the court may grant him any relief consistent with the case made by the complaint and embraced within the issue, a party is entitled to such relief as his evidence, together with the facts averred in his pleadings, justify, regardless of the relief demanded in his prayer. *Jones v. Ceres Invest. Co.* (Colo.) 1918C-429.

3. In such case the sufficiency of the replication should have been tested by demurrer, so that, if bad, plaintiff would have an opportunity to amend, which was denied, by sustaining the motion for judgment on the

pleadings. *Jones v. Ceres Invest. Co.* (Colo.) 1918C-429.

3. Judgment Non Obstante Veredicto.

4. Direction of verdict improperly refused.—Where defendant under the pleadings is entitled to a directed verdict, but its motion is denied, it is not entitled to judgment on motion therefor notwithstanding the verdict. *Lancaster Electric Light Co. v. Taylor* (Ky.) 1918C-591.

4. Judgment on Pleadings.

5. Demurrable defects.—Rev. Code, § 53, declares that the sufficiency of the pleadings shall be determined as prescribed in the act and not otherwise; and section 55 provides that the complaint shall contain a statement of the facts constituting the cause of action and a demand for the relief claimed. In an action for damages for breach of a contract to convey land, setting forth the alleged cause of action, to which a demurrer was overruled, the answer, denying many allegations of the complaint, alleged that, when he made the contracts, plaintiff knew that defendant owned the land, that the contracts were those of a certain named person, that defendant's name was not mentioned therein, and that such person was not its agent, which allegations were denied by the replication, except the allegation that plaintiff, when he made the contract with such person, knew that the lots belonged to defendant, and that its name was not referred to in the contract. It is held that the granting of defendant's motion for judgment on the pleadings was improper, as a motion therefor cannot take the place of a general demurrer, and, unless the pleadings show affirmatively that plaintiff is without right, should not be entertained. *Jones v. Ceres Invest. Co.* (Colo.) 1918C-429.

5. Lien.

6. Against community property.—A judgment against the maker of a bond, guaranteeing a debt to plaintiff, binds the community property of the maker and his wife. *Union Securities Co. v. Smith* (Wash.) 1918E-710.

7. Limitation to interest of debtor.—Rule followed that an attaching or judgment creditor cannot subject to the satisfaction of his claim or judgment any greater interest in property than that owned by the debtor. *Saylor v. Crooker* (Kan.) 1918D-473.

8. Where a debtor holds only the naked legal title to property, and that title was vested in him only as a mortgagee, and the mortgage itself was unenforceable and void, an attaching or judgment creditor cannot subject such property to the payment of the debts or judgment liabilities of the debtor. *Saylor v. Crooker* (Kan.) 1918D-473.

6. Default Judgments.

9. Opening default.—Order opening default judgment in suit for personal injuries

against employers is held to be well within the trial court's discretion; it appearing that defendants relied upon defense being made by their liability insurance company. *Sempier v. Goemann* (Wis.) 1918C-670.

7. Res Judicata.

a. In General.

10. Identity of cause of action.—To sustain a plea of *res adjudicata*, the evidence must show that the cause of action is the same. *Eminent Household of Columbian Woodmen v. Bunch* (Miss.) 1918C-110.

11. An action for permanent total disability, in which it was determined that the plaintiff was not totally disabled, and was acting as a justice of the peace, is not a bar to a later action for disability at a later date when he was not acting as a justice, and the infirmities were the same, except that they had grown worse. *Eminent Household of Columbian Woodmen v. Bunch* (Miss.) 1918C-110.

12. Immaterial differences in facts.—Judgment for a landowner in her suit against a railroad for damages to her land by the negligent construction of the railroad over a water course near the land, which changed the stream's course and caused the land to overflow, is conclusive in the landowner's subsequent suit for damages from the same cause, though the parties stipulated that since the first suit there was an addition to the road's trestle, and an enlargement of the passage for water; the landowner's proof showing that the change did not lessen, prevent, or in any manner affect the overflow caused by the road's negligence in constructing its railway so as to cause a sudden changing of the course of the stream near her land. *Bush v. Stephens* (Ark.) 1918E-259.

13. Matters concluded.—In an action to cancel deeds and set aside registration of land under Laws 1903, p. 311, the trial court properly declines to consider the regularity of the original tax deed, or the evidence presented in a case in which the title was attempted to be quieted, because the decree, etc., in the quieting title action are matters of evidence upon which the trial court acted in the registration suit, and, the proceedings in the registration suit being regular, the trial court in the instant suit is not at liberty to pass upon the sufficiency of the evidence upon which the decree of registration was based. *White v. Ainsworth* (Colo.) 1918E-179.

14. Necessity of judgment.—Without a judgment the plea of *res adjudicata* has no foundation and neither the verdict of a jury nor the findings of a court or referee, even though in a prior action upon the precise point involved in a subsequent action and between the same parties, constitute a bar. *Albright v. Albright* (N. Mex.) 1918E-542.

b. Persons Concluded.

15. Suit in different capacity.—A party is bound by and may plead the conclusive-

ness of a former judgment only in the same capacity in which he was a party to it. *Henry v. Missouri, etc. R. Co.* (Kan.) 1918E-1094.

16. A judgment against one in an individual capacity is not a bar to a claim which is asserted by him in a representative capacity, or as the successor in interest to a corporation which was not precluded by the original judgment. *Murphy v. Wilson* (N. D.) 1918E-1101. (Annotated)

17. A judgment in favor of a minor in an action brought in his behalf by his father as guardian or next friend, to recover for personal injuries resulting from the negligence of his employer, is not conclusive or binding against the defendant in another action brought by the father in his own right to recover for loss of the son's services. *Henry v. Missouri, etc. R. Co.* (Kan.) 1918E-1094. (Annotated)

8. Collateral Attack.

18. An erroneous decree, not void for want of jurisdiction, is not subject to collateral impeachment. *Linn v. Collins* (W. Va.) 1918C-86.

JUDICIAL NOTICE.

See EVIDENCE, 1-5.

As to untruth of allegations regarding rendition of services, in action for death of child, see DEATH BY WRONGFUL ACT, 19.

JUDICIAL SALES.

Injunction against execution sale, see INJUNCTIONS, 5-9, 16, 17, 19, 20.

1. Rights of purchaser—Defect in return.—A purchaser at a sheriff's sale under a mortgage foreclosure, who pays the price and receives a deed from the sheriff, is not prejudiced because the sheriff makes an imperfect return or makes no return at all. *Wolfenberger v. Hubbard* (Ind.) 1918C-81.

2. Where the return of a sheriff making a sale under mortgage foreclosure is silent as to some matter imposed on him in connection with the sale to which the return relates, it will be presumed that the officer did his duty, and it is not error to admit evidence confirming the presumption. *Wolfenberger v. Hubbard* (Ind.) 1918C-81.

3. Effect of notice of previous user of land.—Where defendant purchased land at partition sale, notice that the land had been used by plaintiff and the public for a right of way for a time insufficient to create title by prescription, and notice of recording of plans showing such use for the same period of time, does not affect his title. *Silverman v. Betti* (Mass.) 1918C-90.

4. Grounds for setting aside.—Mere inadequacy of price, unless so great as to shock the conscience or amount to evidence of fraud, will not justify the court in refusing to approve a sale. *Stevenson v. Gault* (Ark.) 1918E-433. (Annotated)

5. Courts will seize upon slight circumstances to add to the weight of inadequacy of price to turn the scale where it appears that the purchaser is in some measure responsible for it. *Stevenson v. Gault* (Ark.) 1918E-433. (Annotated)

6. In case where land worth \$3,500 was sold at judicial sale for \$500, where a bid for \$1,000 was withdrawn, and others refrained from bidding because of a map produced at the sale showing that the land was located in a county where land was worthless, and where purchaser who had been upon the land did not inform bidders that the land was not so located, and the administrator of the estate of the owner was taken into a partnership on the deal by the purchaser, the court is justified in setting aside the sale, although no fraud was intended, and the purchaser did nothing to discourage bidding. *Stevenson v. Gault* (Ark.) 1918E-433. (Annotated)

JUNK DEALERS AND JUNK SHOPS.

1. Validity of license tax.—Laws 1916, c. 704, § 172, requiring junk dealers to take out an annual license, is not in violation of bill of rights, art. 15, providing that every person ought to contribute his proportion of public taxes according to his actual worth in property; it being a tax upon an occupation. *State v. Shapiro* (Md.) 1918E-196. (Annotated)

2. Laws 1916, c. 704, § 172, imposing a license tax upon junk dealers, is not void for uncertainty, although the term "junk dealer" is not defined, as the nature of the business is commonly known, and may be judicially noticed; a "junk dealer" being a person engaged in buying and selling old iron or other metals, glass, paper, cordage, or other waste or discarded material. *State v. Shapiro* (Md.) 1918E-196. (Annotated)

3. Laws 1916, c. 704, § 172, basing license fees for the privilege of dealing in junk upon population of the city or county where conducted, is based upon an accepted theory of classification, and will be presumed to be reasonable, in the absence of conclusive proof to the contrary. *State v. Shapiro* (Md.) 1918E-196. (Annotated)

4. Laws 1916, c. 704, § 172, is a revenue measure not purporting to have any relation to the police power; and where there is no evidence that fees imposed upon junk dealers are excessive, they will be presumed to be fair and reasonable. *State v. Shapiro* (Md.) 1918E-196. (Annotated)

JURISDICTION.

See APPEAL AND ERROR; COURTS; VENUE.
Of juvenile court, see INFANTS, 8-10.

JURY.

Affidavit of jurors to correct mistake in verdict, see VERDICT, 5, 8, 9.

Report of grand jury as privileged communication, see LIBEL AND SLANDER, 14-16.

Scope of requirement of secrecy by member of grand jury, see WITNESSES, 2.

Summary judgment on appeal bond as violating right to trial by jury, see APPEAL AND ERROR, 116.

1. Verdict by less than full number—Validity of statute.—Const. Declaration of Rights, § 7, declaring that the right of trial by jury shall remain inviolate, but that a jury trial may be waived by the parties in the manner prescribed by law, prohibits the legislature from allowing a less number than the whole of a petit jury to render a verdict, for the words "trial by jury," as used in the constitution, should have their common-law meaning, and the essential elements of such trial are that the jury shall be twelve in number, and shall be impartial, and the verdict shall be unanimous. *Minnetonka Co. v. Hendricks* (Ark.) 1918D-687. (Annotated)

2. Competency of juror—Opinion as to merits.—A juror who on his voir dire testified that he had heard detailed what purported to be all the facts by a person who claimed to know all about the case of his own knowledge, and that he had a fixed opinion as to the guilt or innocence of the defendant that it would take strong evidence to remove, is clearly incompetent to sit as a juror and on a challenge for cause should be rejected, even though on further examination he stated that he could and would, notwithstanding such opinion, act impartially and fairly, and render an impartial verdict upon the law and the evidence, and where the defendant exhausts his peremptory challenges, and such juror is retained on the panel, the overruling of the challenge is ground for reversal. *Morehead v. State* (Okla.) 1918C-416.

3. Peremptory challenges.—In a will contest, the sole issue being will or no will, the parties proponent and the parties contestant are entitled to but four peremptory challenges. *Walsh's Estate* (Mich.) 1918E-217.

4. Grounds for challenge—Drawing of excessive number.—An objection that an excess of names of jurors was drawn does not go to the whole panel, but applies only to the excess, and is only a matter of challenge to the individual jurors drawn in excess. *State v. Morse* (S. D.) 1918C-570.

5. Irregularities in drawing.—Under Code Cr. Proc. §§ 320-322, defining a "challenge to the panel" as an objection to all the trial jurors, and providing that it may be founded on a material departure from the forms prescribed by law, a challenge to the panel on the ground that the same was not selected or drawn in the manner provided by statute, that the jury drawers drew from the jury box some names that were not included in the list summoned to appear as jurors, and that some of the jurors drawn from the box were not summoned and are not present as jurors, is properly overruled for insufficiency of allegations of grounds

for a challenge. *State v. Morse* (S. D.) 1918C-570.

6. A challenge to the panel on the ground that the officers, after having drawn from the box the number of names provided for in the order of the court, discarded certain names and drew others in their place, is properly overruled for failing to show, as required by Laws 1913, c. 280, § 1, that accused was prejudiced thereby in his substantial rights, though by Pol. Code, § 717, the person drawing the names has no authority to discard names, so that there was a departure from the forms prescribed. *State v. Morse* (S. D.) 1918C-570.

7. Juror making affidavit in case.—One giving an affidavit that he believes that accused, seeking a change of venue, may obtain a fair trial, may not be challenged as a juror for implied bias under Code Cr. Proc. § 339, stating the only causes of a challenge for implied bias, which do not include the giving of such an affidavit as a cause. *State v. Morse* (S. D.) 1918C-570.

8. One giving to the state's attorney, for use in resisting a motion for change of venue, an affidavit wherein he asserts that he believes that accused can have a fair trial in the county, may not be challenged for actual bias. *State v. Morse* (S. D.) 1918C-570.

9. Failure to answer challenge.—The failure of the state to except or answer a challenge to the panel in advance of the overruling thereof by the court is not prejudicial, where the challenge cannot be sustained. *State v. Morse* (S. D.) 1918C-570.

10. Ruling on challenge.—The discretion of the trial court conferred by Code Cr. Proc. § 338, in determining the question of actual bias of a juror, will not be disturbed on appeal except for abuse of discretion. *State v. Morse* (S. D.) 1918C-570.

11. Misconduct.—Disclosure of state of deliberations.—The mere fact that in response to an inquiry of the court as to how the jury stood numerically, the foreman answered: "Eight for conviction and four—" is no ground for a new trial, where it does not appear that the defendant was prejudiced by such misconduct. *Poling v. State* (Okla.) 1918E-663. (Annotated)

JUSTICE OF THE PEACE.

As judge, see JUDGES, 1.
Justice's Court as court, see JUDGES, 1.

1. Default judgment.—Failure to attend court.—In an action before a justice of the peace, agreement that the case could not be tried until Wednesday afternoon not amounting to an agreement to try the case in vacation, the court being in session on Wednesday afternoon, the justice had full and complete jurisdiction to dispose of it at that time or not, and, it being the duty of defendant to have informed himself that the term was still in session, and to have ascertained what would be done with his case, a default judgment rendered on Thursday

morning when the case was reached in due course is not void. *Welch v. Hannie* (Miss.) 1918C-325.

2. Suspension of trial.—A judgment by default in an action before a justice of the peace is not rendered void because the justice, while it was pending, suspended business in his courtroom to sit as one of the committing justices for an alleged crime occurring in his district, although by agreement the trial took place in another district. *Welch v. Hannie* (Miss.) 1918C-325.

3. Effect of errors of justice.—In a suit for unliquidated damages, tried before a justice of the peace, the irregular introduction of plaintiff's testimony by statement of his counsel that the testimony was the same as in a previous trial, and, the justice being judge both of the law and the facts, the failure to introduce testimony as to the amount of damages, are defects rendering a default judgment irregular or voidable, but not void, and the irregularity can only be taken advantage of by appeal or writ of certiorari. *Welch v. Hannie* (Miss.) 1918C-325.

4. Necessity for writ of inquiry.—In an *ex delicto* case, there is no necessity for a writ of inquiry at a trial before a justice of the peace, because, unless a jury is called for, the justice passes upon the questions of liability and amount of damages at the same time, and it is only necessary to introduce testimony showing damages when the default judgment is taken. *Welch v. Hannie* (Miss.) 1918C-325.

JUSTIFICATION.

For utterance of libel, see LIBEL AND SLANDER, 36-43.

JUVENILE COURTS.

See INFANTS, 8-15.

LABOR COMBINATIONS.

1. Statutes Affecting, 135.
2. Orders and Rules, 136.
3. Strikes, 136.
4. Boycotts, 136.
5. Actions, 136.

See LABOR LAWS.

1. Statutes Affecting.

1. Ordinance against picketing.—A municipal ordinance defined conspiracies to injure trade, business, or commerce as any combination or agreement between two or more persons not to buy from or sell to, or have dealings with any person or persons, or to induce or attempt to induce other persons not to buy from or have dealings with any person or persons, etc., for the purpose or with the intent to compel or force employ-

ment or discharge from his employment. The ordinance further declared that if any person, alone or in company with others shall carry or display, or cause to be carried or displayed, print, or circulate, or cause to be printed or circulated, any banner, sign, etc., which by its terms directly or indirectly induces or attempts to induce others not to buy from or sell to or have dealings with any designated person, or shall loiter or parade back and forth, or cause any person or persons to loiter or parade back and forth, in front of, or in the vicinity of, any store, etc., such conduct shall be prima facie evidence of a conspiracy to injure the trade or business of the person or persons referred to by the banner, etc., or whose property is thus patrolled. A "strike" is defined as the act of a body of workmen employed by the same master in stopping work all together at a prearranged time, and refusing to continue until some concession is granted by the employer, while a "boycott" is defined as a combination to cause a loss to one person by coercing others against their will to withdraw from him their business intercourse, by threats that unless others do so, the combination will cause similar loss to them. It is held that the ordinance, though valid as applied to "picketing," which is defined as posting members of a trade union on a strike at all the approaches to works for the purpose of observing or reporting the workmen going to or coming from the works, and of using such influence as may be in their power to prevent the workmen from accepting work there, it is invalid in depriving workmen of their right to strike en masse; that right having been recognized for many years. *Hall v. Johnson* (Ore.) 1918E-49. (Annotated)

2. Orders and Rules.

2. Voluntary orders by a labor organization for the benefit of its members and the enforcement thereof within the organization is not coercion, as members who are not willing to obey the orders are at liberty to withdraw from the organization. *Bossert v. Dhuy* (N. Y.) 1918D-661. (Annotated)

3. The voluntary adoption by an association of employees of reasonable rules relating to persons for whom and conditions under which its members shall work is not illegal at common law. *Bossert v. Dhuy* (N. Y.) 1918D-661. (Annotated)

4. An association of individuals may determine that its members shall not work for specified employers of labor, and, if the determination is in good faith and not through malice or otherwise to injure an employer, that such action does result in incidental injury does not warrant an injunction. *Bossert v. Dhuy* (N. Y.) 1918D-661. (Annotated)

5. Enforcement.—The enforcement, by fine or expulsion, of rules adopted by an association relating to persons for whom members may work, is not illegal. *Bossert v. Dhuy* (N. Y.) 1918D-661. (Annotated)

6. Work with nonunion employees or material.—It is not illegal for the officers and agents of a trade union to refuse to allow members of the brotherhood to work in plaintiffs' mill with nonunion men or to refuse to allow its members to work in the erection of materials furnished in a non-union shop. *Bossert v. Dhuy* (N. Y.) 1918D-661. (Annotated)

7. The voluntary adoption of a rule not to work upon nonunion made material and its enforcement in a particular case differs from a general boycott of a particular dealer with a malicious purpose to destroy his good will or business, and an act done maliciously for an illegal purpose may be restrained, but, when done in good faith for a legal purpose, may be held to be within the bounds of reasonable business competition. *Bossert v. Dhuy* (N. Y.) 1918D-661. (Annotated)

8. Requiring employment of certain number of musicians.—A rule of musicians organized in a union, whereby a theater is compelled to employ a number of musicians specified by the union if it wishes to employ any member of the union, though in the theater's opinion the employment of a single musician is the most advantageous way of conducting its business, and the employment of more than one musician will cause it pecuniary loss, was illegal, and subject to injunction, as interfering with an employer's right to a free flow of labor. *Haverhill Strand Theatre v. Gillen* (Mass.) 1918D-650. (Annotated)

3. Strikes.

9. A strike by a labor union is one of the legal means, which laborers have a right to resort to, to enforce a legal combination. *Haverhill Strand Theatre v. Gillen* (Mass.) 1918D-650.

4. Boycotts.

10. Where a combination, as of a labor union, is a legal one, a plaintiff, as an employer, has a right to complain if the parties to the combination undertake to enforce it by legal means. *Haverhill Strand Theatre v. Gillen* (Mass.) 1918D-650.

11. A boycott and threats of intimidation by using physical violence are illegal means of enforcing a legal combination of laborers in a union. *Haverhill Strand Theatre v. Gillen* (Mass.) 1918D-650.

12. For a union to call upon the public generally to discontinue using plaintiffs' material and seek to prevent all persons, by communication or otherwise, from dealing with plaintiffs, is illegal. *Bossert v. Dhuy* (N. Y.) 1918D-661.

5. Actions.

13. Injunction against unlawful acts.—If a labor union notifies an employer that it will enforce an illegal rule of the union, which operates to the employer's prejudice, he has a right to bring a bill to have the union enjoined from enforcing it, even in the absence of a strike or of threats on the part

of the union, since, when a combination is illegal, a person has a right to have it enjoined in case it operates to his prejudice, on proving the fact that the persons involved in the combination intend to enforce it. *Haverhill Strand Theatre v. Gillen* (Mass.) 1918D-650.

14. Question of law.—Whether the purpose for which a combination of laborers is made does or does not justify interference with an employer's right to a free flow of labor is a question of law for the court. *Haverhill Strand Theatre v. Gillen* (Mass.) 1918D-650.

LABOR LAWS.

See LABOR COMBINATIONS.

Judicial notice of labor conditions of women, see EVIDENCE, 5.

Validity of act prohibiting transportation in interstate commerce of products of child labor, see INTERSTATE COMMERCE, 10-12.

1. Federal hours of service act.—Unavoidable accidents causing delay do not excuse a carrier, under the proviso in section 3 of the Hours of Service Act of March 4, 1907 (34 Stat. at L. 1416, chap. 2939, Fed. St. Ann. 1909 Supp. p. 581), § 3, "that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen," in keeping a train crew on duty beyond the prescribed period in order to complete the regular run after the train had arrived at an intermediate point (a division terminal, but not the terminal for the train crew) at which the company could readily have substituted a relief crew for the men who had then already been on duty for more than the prescribed period. *Atchison, etc. R. Co. v. United States* (U. S.) 1918C-794.

(Annotated)

2. Requiring toilet rooms for employees.—Laws 1913, p. 401, requiring foundries to provide sanitary facilities for workmen, is not invalid, as special legislation, because not applying to all establishments generally, since the word "establishments" means institutions, and usually applies to concerns of a public nature, and frequently includes the places where they are conducted, as well as the physical things connected therewith. *State v. Scullin-Gallagher Iron, etc. Co.* (Mo.) 1918E-620.

(Annotated)

3. "Foundries" are works for the casting of metals, and, the conditions and circumstances under which foundry employees work being different from those of other employments, Laws 1913, p. 401, requiring foundries to provide sanitary toilet facilities for workmen, is not invalid as class legislation. *State v. Scullin-Gallagher Iron, etc. Co.* (Mo.) 1918E-620.

(Annotated)

4. Minimum wage rate for women.—Laws 1915, p. 781, establishing a minimum wage

for females, does not violate Const. U. S. Amend. 14, by interfering with the right of contract of employer and employees, but is a valid exercise of the state's police power, being intended to protect the health and morals of female employees. *State v. Crowe* (Ark.) 1918D-460.

(Annotated)

5. It must be presumed that the legislature passed Laws 1915, p. 781, establishing a minimum wage for females to remedy existing perils, and while the minimum wage established must be fair and reasonable, it must be presumed that the legislature properly exercised its power to establish such wage. *State v. Crowe* (Ark.) 1918D-460.

(Annotated)

6. Limiting hours of labor for females.—Validity of statute.—Chapter 45, Laws 1915, limiting hours of labor for females, is unconstitutional, so far as applying to restaurants, as class legislation, under Const. U. S. Amend. 14, because applying to all hotels and restaurants except those "operated by railroad companies;" the distinction being an arbitrary and unreasonable one. *State v. Le Barron* (Wyo.) 1918D-998.

(Annotated)

7. Such statute is unconstitutional, so far as applying to restaurants, as violating Const. art. 1, § 34, providing that all laws of a general nature shall have a uniform operation. *State v. Le Barron* (Wyo.) 1918D-998.

(Annotated)

8. Such statute is unconstitutional, so far as applying to restaurants, as contravening Const. art. 3, § 27, providing that in all cases where a general law can be made applicable no special law shall be enacted. *State v. Le Barron* (Wyo.) 1918D-999.

(Annotated)

9. Employees included.—Under St. 1913, c. 758, providing that no woman shall be employed in laboring in any mercantile, mechanical establishment, telegraph office, or telephone exchange more than ten hours in any one day, and that in no case shall the hours of labor exceed fifty-hour in a week, a grocery company, which employs a woman as cashier in excess of the statutory hours of labor, it being her duty to sit in a "cage" having room for two persons and make change for customers' slips, also doing some bookkeeping, is guilty of a violation of the act. Although the history of the words "in laboring" in such enactments would seem to qualify the word "employed" so as to exclude from the operation of the statute all employees not engaged in physical labor, such a construction is prevented by the fact that the act includes within its inhibition women in telegraph offices and telephone exchanges whose labor involves mental alertness, rather than manual labor. *Com. v. John T. Connor Co.* (Mass.) 1918C-337.

(Annotated)

10. Dressmaking shop.—A dressmaker employing from five to ten girls in operating sewing machines, who purchases and furnishes materials and makes garments for general sale as well as to special order conducts a "manufacturing establishment" within the statute forbidding the employ-

ment of females for more than eight hours a day in such an establishment. *Hotchkiss v. District of Columbia* (D. C.) 1918D-683. (Annotated)

11. Such a dressmaking shop is not a "mercantile establishment" within the same act. *Hotchkiss v. District of Columbia* (D. C.) 1918D-683.

LABOR UNIONS.

See **LABOR COMBINATIONS.**

LACHES.

Necessity of finding as to issue excluded by laches, see **TRIAL**, 11.

Of suit to cancel deed from state for fraud, see **PUBLIC LANDS**, 13, 14.

1. Application to state.—The doctrine of laches is applicable to the state. *State v. Hyde* (Ore.) 1918E-688.

2. Delay in enforcing subscription to corporate stock.—An action in equity by an injured stockholder who has paid for his stock in full against delinquent subscribers, who are also controlling directors of the corporation, for their refusal to call for their own unpaid subscriptions, so that they may become part of the corporation's assets to meet its liabilities, in the absence of any showing that the defendants were in any way prejudiced by the plaintiff's action in participating with them in borrowing money with knowledge that their subscriptions were unpaid, and in waiting seven years before bringing the action, or that any change of conditions had taken place during the delay, is not barred by laches; the doctrine of laches, as a defense, being founded on the principle of equitable estoppel which will not permit the late assertion of a right where other persons, by reason of the delay, will be injured. *Bergman v. Evans* (Wash.) 1918C-848.

3. In such action, laches is not a bar where the illegal acts continued up to the day of the suit. *Bergman v. Evans* (Wash.) 1918C-848.

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LANDLORD AND TENANT.

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Right of tenant to remove fixtures, see **FIXTURES**, 2-8.

1. Leases.

a. Acknowledgment.

1. Necessity.—Under the statutes an unacknowledged lease for over a year is void except as it creates a tenancy from month to month, or other rent period. *Jamison v. Reilly* (Wash.) 1918D-160. (Annotated)

b. Construction Generally.

2. Against lessor.—In case of doubt or uncertainty as to meaning of language used in a lease, its provisions will be construed most strongly against the lessor and in favor of the lessee. *McClintock, etc. R. Co. v. Aetna Explosives Co.* (Pa.) 1918E-1078.

3. Covenant to insure—Acts of public enemy.—A covenant in a lease binding the tenant to keep the premises insured against fire in a named insurance company or some other responsible company does not obligate him to insure against fire caused by the military operations of the public enemy, where the company named does not insure against risks of that kind. *Unjohn v. Hitchens* (Eng.) 1918E-294. (Annotated)

4. Showing intent.—Acts of the parties to the lease, before and after its making, may be proven to show their intent in making it. *Bank of Commerce, etc. Co. v. Burke* (Tenn.) 1918C-439.

c. Modification.

5. Revoking conditional assent to modification.—Where a tenant, who has consented to the landlord's instalment of a stove in her premises, though the lease calls for furnace heat, writes a letter, informing him of her rights under the lease and demanding furnace heat, stating that the stove is unsatisfactory, her conditional assent to the installation of the stove is revoked. *Buchanan v. Orange* (Va.) 1918D-391.

2. Possession and Use of Premises.

a. Lease of Part of Building.

6. Where the subject of a lease is only the floor of a building, the landlord controlling his own land and all the rest of the building,

the rigid principles governing the relation of landlord and tenant, owing to the sanctity with which the common law looked upon land, are relaxed. *Buchanan v. Orange* (Va.) 1918D-391.

b. Use of Premises.

7. Lease for saloon and restaurant—Effect of refusal of license.—A licensee is not released from liability under a lease for a saloon and restaurant, because of a subsequent order of the liquor license commissioners prohibiting further use of the premises for a saloon, even if it was not due to failure to conduct the business lawfully, the lessor not having been responsible for the order, the lessee not being thereby entirely deprived of the beneficial use conferred by the lease, the specified lines of business not being identical or inseparable, a "restaurant" being an establishment where meals and refreshments are served, while a "saloon" is a place where intoxicating liquors are sold and consumed, and the lease making no provision for the contingency of inability to secure a saloon license. *Standard Brewing Co. v. Weil* (Md.) 1918D-1143. (Annotated)

c. Repairs and Improvements.

8. Covenant of lessor to pay for improvements—Liability of grantee.—Land was leased for an amusement park, the lessee to be entitled to all rents from persons desiring to use the premises for amusements. All improvements placed on the premises by the lessee to carry out the provisions of the lease, at the expiration of the lease, were to be purchased by the lessor at seventy-five per cent of their original cost. The lease declared that covenants should be binding upon the executors, administrators of the parties to the lease. The lessee took possession and constructed improvements and the lessor conveyed his reversion. *Rev. St. 1874, c. 80, § 15*, declares that a lessee shall have the same remedy, by action or otherwise, against the lessor, his grantees, assignees, or their representatives for the breach of any agreement as such lessee might have against his immediate lessor of the premises. It is held that the agreement by the lessor to purchase the improvements at the expiration of the lease was enforceable against the grantee or assignee of the lessor, though assignees were not mentioned in the lease. *Purvis v. Shuman* (Ill.) 1918D-1175. (Annotated)

d. Personal Injuries.

9. Negligence of landlord's agent and workman.—A cause of action against an agent for the renting of real property is stated in a petition which alleges that the agent contracted at the time of renting the property to repair a walk thereon; that afterward, being requested by the tenant to repair the walk, the agent employed a man to do the work whom he knew to be careless, negligent, and incompetent; that after some repairs had been made the agent informed the plaintiff, wife of the tenant, that

the walk had been inspected and repaired and was all right and safe for her use, although after being repaired the walk was in a dangerous and unsafe condition; and that the dangerous condition of the walk caused her to fall and break her arm. *Wells v. Hansen* (Kan.) 1918D-230. (Annotated)

10. In such a case a cause of action is stated against the workman, where the petition alleges that the workman employed to make the repairs, after making some repairs, informed the plaintiff, the tenant's wife, that the walk had been inspected and repaired and was all right and safe for her use; alleges that the walk after being repaired was in a dangerous and unsafe condition; and that the plaintiff was injured by reason of the defect in the walk. *Wells v. Hansen* (Kan.) 1918D-230.

3. Assignment or Subletting.

11. Waiver of provisions.—Though a brewing company is prohibited by statute from engaging in the saloon business, such a company is not entitled to be discharged from liability under a lease to it of property to be used for a saloon, on the ground that it was illegal and void from its inception; it, while admitting of construction that the company itself was to conduct the saloon, and formally providing that the premises should not be sublet without the lessor's written consent, providing that the business should be conducted in compliance with the law, and the parties having from the outset acted on the theory that the proper and practical method of operating under the lease was for the lessee to sublet to one who could legally engage in the business, and the provision against subletting being thus waived and ineffective. *Standard Brewing Co. v. Weil* (Md.) 1918D-1143.

4. Rent.

12. Unlawful sale of liquor on premises—Landlord's knowledge.—Where a lease of a building does not itself set forth an illegal intent or use, and where nothing else appears, the lessor is not debarred from recovery of rent by his knowledge that the tenant intends to use the premises for the illegal sale of liquor. *Bank of Commerce, etc. Co. v. Burke* (Tenn.) 1918C-439. (Annotated)

13. If premises are leased for lawful purposes, the mere noninterference by landlord with subsequent illegal traffic of his tenant, after becoming aware of it, does not involve him in the tenant's guilt as showing participation. *Bank of Commerce, etc. Co. v. Burke* (Tenn.) 1918C-439. (Annotated)

14. Although a lease of a building does not itself set forth any illegal intent or use, if the lessor at the time of leasing knows and intends that the premises shall be used for an illegal purpose, such as prohibited sales of intoxicating liquor, and he does anything in furtherance of the transgression, he cannot recover rent. *Bank of Commerce, etc. Co. v. Burke* (Tenn.) 1918C-439.

(Annotated)

15. Where a building has long been occupied as a saloon, is so outfitted, is offered for rent as peculiarly valuable for a saloon business, and after the leasing is used for a saloon by the lessee and sublessee with the knowledge of the agents of lessors, although it is leased in terms for use as a "storehouse," lessors cannot recover rent. *Bank of Commerce, etc. Co. v. Burke* (Tenn.) 1918C-439. (Annotated)

16. Liability of assignor.—A landlord by recognizing the assignment of the lease and accepting rent from the sublessee, surrenders his right to collect rent from the lessee. *Jamison v. Reilly* (Wash.) 1918D-160.

5. Termination of Lease.

17. Waiver of Notice.—A landlord by recognizing the assignment of the lease and accepting rent from the sublessee, waives any notice from the lessee terminating the lease. *Jamison v. Reilly* (Wash.) 1918D-160.

18. Constructive eviction.—Where a lessor of premises which were intended to be used for a millinery shop agreed to furnish furnace heat and electric light, his failure to furnish such heat and light, although he did install a stove which soiled the tenant's goods, constitutes a constructive eviction, warranting the tenant in vacating the premises. *Buchanan v. Orange* (Va.) 1918D-391. (Annotated)

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1. Statutory Provisions.

1. Effect of Penal Statute.—St. 1915, § 1217, providing the penalty for any false statement as to a candidate for office intended to affect a primary, does not change the law on civil liability, but is cumulative to it. *Putnam v. Browne* (Wis.) 1918C-1085.

2. Nature and Elements.

2. Imputation indirectly made.—That a charge is made obliquely and by inference, instead of directly, renders it none the less defamatory. *McClintock v. McClure* (Ky.) 1918E-96.

3. Circumstances of publication. — The time, place, and circumstances attending upon the alleged slanderous words are an important consideration; not only may the occasion and surrounding circumstances rebut the presumption of malice, but a distinction is recognized in many particulars between the same or similar defamatory words, when spoken in passion or the heat of controversy, and when deliberately written or printed, and that which would be actionable as libel may not support an action for slander. *Bolton v. Walker* (Mich.) 1918E-1007.

3. Words Constituting Libel or Slander.

a. Construction of Words.

4. Construed as a whole.—In determining whether statements in a newspaper editorial as to a candidate for office are libelous, the article must be construed as a whole. *Putnam v. Browne* (Wis.) 1918C-1085

b. Charging Commission of Crime.

5. Charging illegal use of money by candidate.—Under St. 1898, § 4543b, prohibiting collection of money for campaign funds, the expenditure of money so collected is unlawful, and a false accusation of such expendi-

ture is libelous. *Putnam v. Browne* (Wis.) 1918C-1085.

c. Charging Disease.

6. Imputation of insanity.—A charge imputing a hereditary predisposition to insanity, and that plaintiff has done things indicating impending insanity, is defamatory and libelous per se, from which malice is ordinary inferable. *McClintock v. McClure* (Ky.) 1918E-96. (Annotated)

d. Political Criticism.

7. False statements of fact as to use of campaign funds by candidate for judge, though made without malice, are actionable. *Putnam v. Browne* (Wis.) 1918C-1085.

8. False statements in a newspaper editorial implying that plaintiff, a candidate for judge, took part in unlawful distribution of a campaign fund or that he sold his political influence and surrendered his honest belief for money, are libelous. *Putnam v. Browne* (Wis.) 1918C-1085.

9. Statements in a newspaper editorial that a candidate for judge distributed in lawful ways a campaign fund, and received money for using his political influence lawfully, are not libelous. *Putnam v. Browne* (Wis.) 1918C-1085.

4. Privileged Communications.

a. In General.

10. Absolute privilege.—If the privilege attending words spoken is absolute, the questions of good faith and absence of malice are immaterial, in an action for slander based thereon. *Bolton v. Walker* (Mich.) 1918E-1007.

11. Qualified privilege.—The rule of qualified privilege in the law of slander relates more particularly to private interests, where the occasion casts on defendant a duty or right to communicate to another some matter of special concern to one or both, or to others for the protection of society or some interest he represents. *Bolton v. Walker* (Mich.) 1918E-1007.

b. In Respect to Judicial Proceedings.

12. Remarks of prosecutor not in course of proceeding.—Remarks uttered by a prosecuting attorney, criticising an attorney who opposed him in the trial of a lawsuit, are not justified as within the privilege of the attorney, if the remarks were not made in the course of the judicial proceeding. *Viosca v. Landfried* (La.) 1918C-1193. (Annotated)

13. Although it is the privilege of the publisher of a newspaper to publish a fair statement of whatever is said and done in the course of a judicial or other public proceeding, it is not within his privilege to publish a severe personal criticism indulged in by an attorney who was engaged in a lawsuit, criticising an attorney who was opposed to him therein, if the criticism was made before or after the judicial proceedings, and was no

part thereof. *Viosca v. Landfried* (La.) 1918C-1193. (Annotated)

14. Report of grand jury.—That a libelous unauthorized report was presented in open court by the foreman of the grand jury, purporting to act in behalf of all the members, and that they were all present, apparently acquiescing in what was done is prima facie evidence that all of them acted in or acquiesced in its publication. *Bennett v. Stockwell* (Mich.) 1918E-1193.

15. The report of a grand jury not being privileged, good faith of the members is not a bar to action for libel, but bears only on mitigation of damages. *Bennett v. Stockwell* (Mich.) 1918E-1193. (Annotated)

16. A grand jury having no authority to make a report, not followed by indictment, reflecting on an official, it is not privileged, even qualifiedly, as regards liability of the members for libel. *Bennett v. Stockwell* (Mich.) 1918E-1193. (Annotated)

c. Communications between Principal and Agent.

17. If the agent for a bonding company, acting in good faith, without malice, and in the exercise of his duty, or information believed to be reliable, wrote the company's state agents that the mother of a person on whose bonds the company was surety had lost her mind, etc., so acting in the exercise of his duty to communicate to the company any facts or information affecting its interest, the agent is not liable for libel. *McClintock v. McClure* (Ky.) 1918E-96.

18. The fact that a communication from an agent to his principals is qualifiedly privileged does not change the actionable quality of the words published, but merely relieves from the presumption of malice. *McClintock v. McClure* (Ky.) 1918E-96.

19. A communication ordinarily libelous per se is relieved from the presumption of malice when written by an agent to his principals in relation to their business, being qualifiedly privileged, the burden of proof being on plaintiff, in an action against the agent, to show that it was written and published with malice. *McClintock v. McClure* (Ky.) 1918E-96.

20. Effect of malice.—If defendant, actuated by malice to express a doubt as to plaintiff's mental condition, and in order to bring about a cancellation of plaintiff's bonds in which a bonding company, defendant's principal, was surety, wrote the company that plaintiff's mother lost her mind, and that his judgment was that they had just as well drop the bond, etc., defendant is liable to plaintiff. *McClintock v. McClure* (Ky.) 1918E-96.

d. Comment on Public Affairs.

21. A newspaper publication commenting on the organization of a newly elected municipal council, referring to it as a "Tammany" system and stating that a "rake-off" is suspected, is held not to exceed, as a matter of law, the bounds of fair comment on public

affairs and to be qualifiedly privileged. *Bulletin Co. v. Sheppard* (Can.) 1918E-151.

(Annotated)
22. Absolute privilege in the law of slander applies more directly to matters of public concern, in regard to which it is considered for the general welfare that persons should be permitted to express their views more freely and fearlessly than in regard to private matters or persons. *Bolton v. Walker* (Mich.) 1918E-1007. (Annotated)

23. Discussion at meeting of board.—Where the board of estimates of a city at a regular meeting was discussing a matter of public interest properly before it, there was an element of privileged communication in remarks made by one ex officio its member. *Bolton v. Walker* (Mich.) 1918E-1007.

24. Where the board of estimates of the city of Detroit, created by legislative enactment, and given a power of restraint in relation to taxation formerly vested in the electors, thus exercising a negative function in taxation, demanding the exercise of a semi-legislative discretion, was discussing a matter of public interest properly before it at a regular meeting, when one ex officio a member of the board, entitled to participate in discussion, but not to vote, made an alleged slanderous remark regarding another member, the case presents a case of absolute privilege. *Bolton v. Walker* (Mich.) 1918E-1007. (Annotated)

e. Concerning Candidate for Office.

25. By becoming a candidate for judge, a person places his character as to integrity, incorruptibility, and judicial ability before the people for consideration, so that an individual or a newspaper may in good faith and without malice criticize him in those respects even severely and caustically, but insult or contempt or false and libelous statements of fact are not so privileged. *Putnam v. Browne* (Wis.) 1918C-1085.

26. Comparison to Judas Iscariot.—An obvious and thinly veiled reference in a newspaper editorial comparing a candidate for office to Judas Iscariot is a jibe and insult, and not privileged. *Putnam v. Browne* (Wis.) 1918C-1085.

b. Official Communications.

27. One who in good faith and from a sense of public duty states to an officer that another has committed a crime is not liable, though the charge be absolutely false. *Putnam v. Browne* (Wis.) 1918C-1085.

(Annotated)

g. Communication by One Owning Duty to Another.

28. Plaintiff was in charge of one of defendant's stores, and V. was defendant's general manager in charge of the territory, including such store. While V. was taking an inventory, plaintiff left the store without explanation, and did not return that day. M., a familiar friend of plaintiff, with whom plaintiff lived, called at the store and in-

quired for plaintiff, and V. told him that plaintiff had acted in a very peculiar way, and had gone off without saying anything, and that his stock and his cash were short. It is held that while, it was perhaps not unnatural for V. to tell M. of the shortage, he owed no duty to M. to make such statement, and there was no basis for a claim of privilege. *Grand Union Tea Co. v. Lord* (U. S.) 1918C-1118.

5. Actions.

a. Persons Liable.

(1) In General.

29. Liability of corporation.—A corporation is liable for the slanderous words of its agent if the agent at the time is transacting its business and the slanderous words are spoken in the course of such business and in connection therewith. *Grand Union Tea Co. v. Lord* (U. S.) 1918C-1118.

30. Plaintiff was in charge of one of defendant's stores, and while defendant's manager was making an inventory left the store without explanation. M., a friend of plaintiff, stopped at the store and inquired for him, and the manager told him that plaintiff had acted in a very peculiar way and went off without saying anything, and that his stock and his cash were short. It is held that defendant was liable for the manager's language, as he was engaged in its business and acting in its behalf when the words were spoken and they referred to plaintiff's acts in the work for which he was employed. *Grand Union Tea Co. v. Lord* (U. S.) 1918C-1118.

(2) Joint Liability.

31. If a libel is the joint act of several persons, they may be sued jointly or separately; and, if sued separately, both actions may be prosecuted to judgment, and in neither action will the liability of the other wrongdoer furnish any defense or mitigation. *Morse v. Modern Woodmen of America* (Wis.) 1918D-480.

32. A master and servant, acting together in publishing a libel, may be sued jointly or severally, as in the case of other joint tortfeasors; and, if sued separately, a judgment against one is not a bar to the action against the other until satisfied. *Morse v. Modern Woodmen of America* (Wis.) 1918D-480.

33. Where the agent of a fraternal order knowingly participates with the order in circulating the libel, he becomes jointly liable with it, although his efforts are confined to a part of the territory in which the order circulated the libel; and the injured party may sue both him and the order in separate actions, and prosecute both actions to judgment. *Morse v. Modern Woodmen of America* (Wis.) 1918D-480.

34. Satisfaction of one judgment.—Though, where a libel is the joint act of several persons, actions against each may be prosecuted to judgments, there can be but one satisfaction; and, when one judgment is sat-

isfied, it becomes a bar to the other actions. *Morse v. Modern Woodmen of America* (Wis.) 1918D-480.

35. The payment into court of the amount recovered against the agent will not bar the action against the fraternal order, especially where the time for appeal has not expired, as the right to bring separate actions includes the right on the part of plaintiff to choose which judgment he will accept and satisfy. *Morse v. Modern Woodmen of America* (Wis.) 1918A-480.

b. Defenses.

36. Truth as defense.—Truth of the statements made is a defense to an action for libel. *McClintock v. McClure* (Ky.) 1918E-96.

37. Defendant admitting the speaking of the substance of the words charged, though not the exact words, may justify the speaking on the ground of their truth. *Ray v. Shemwell* (Ky.) 1918C-1122. (Annotated)

38. Necessity that justification be broad as charge.—In an action for libel, a defense that a part of the statements made was true is incomplete, since the justification must be as broad as the libel. *Putnam v. Browne* (Wis.) 1918C-1085. (Annotated)

39. Proof of the truth of the words spoken is a good defense in an action for slander, but the justification must be as broad and complete as the misconduct charged. *Grand Union Tea Co. v. Lord* (U. S.) 1918C-1118. (Annotated)

40. Words substantially true.—Newspapers are not held to the exact facts or the most minute details of transactions which they publish, the law only requiring that an article be substantially true, although they should exercise due care in gathering and publishing news. *State Journal Co. v. Redding* (Ky.) 1918C-332. (Annotated)

41. Where a newspaper article is published in good faith and is substantially true, the defense is complete, although the publication is inspired by malice or ill will. *State Journal Co. v. Redding* (Ky.) 1918C-332. (Annotated)

42. Where defendant pleads justification in an action for libel, only the substance of the alleged libelous words need be proved to be true to sustain the defense, so that proof that plaintiff used \$185 of a campaign fund, where the statement was that he used \$385, is sufficient to justify the statement. *Putnam v. Browne* (Wis.) 1918C-1085. (Annotated)

43. Evidence showing that plaintiff concealed and carried away a book belonging to defendant publishing company, his former employer, and claimed by him to have been taken by mistake, supposing it was a book which he had a right to take, for which he was arrested and later discharged, is held to be sufficient to justify the publication of a newspaper article charging him with theft and giving a substantially correct account of the matter, although the evidence may not have been sufficient to establish his guilt beyond a reasonable doubt. *State Journal Co. v. Redding* (Ky.) 1918C-332. (Annotated)

c. Pleading.

44. Pleading justification.—The charge in the slanderous words complained of, "He stole from me," being general, and not specific, the pleading in justification must aver the acts constituting the stealing, to give plaintiff notice. *Ray v. Shemwell* (Ky.) 1918C-1122.

45. In an action for slander for using the words, "He is a damn drunken thief; he has stolen my steer," defendant's answer admitting saying of the plaintiff "if Alex Cain had sold the steer it was the same as stealing," and alleging, if that charges him with stealing the steer, that such charge is true, does not plead a justification because of the variance. *Cain v. Osler* (Iowa) 1918C-1126. (Annotated)

46. Plea in mitigation.—In an action for slander, a plea in mitigation must, in its nature, be a confession and avoidance, and not a pleading of some other matter and the justification thereof, and there is no error in striking out a plea which does not admit saying "he is a damned drunken thief; he has stolen my steer," nor the truth of these words as charged, but denies it and alleges that he said "if Alex Cain sold the steer it was the same as stealing," and if that charges plaintiff with stealing, the charge is true, as it does not allege mitigating circumstances upon which defendant may rely. *Cain v. Osler* (Iowa) 1918C-1126.

47. Amendment to plea.—In an action for slander, where the original answer pleads that the charges made by defendant against plaintiff are true and that they were made in good faith and without malice, an order striking out an amendment to the answer which added nothing to the original plea of mitigation and did not affect plaintiff's character is not error. *Cain v. Osler* (Iowa) 1918C-1126.

d. Evidence.

48. Truth of charge.—In an action for libel by imputing to plaintiff a hereditary predisposition to insanity, by a writing in which the defendant stated that the plaintiff's mother had lost her mind, where the defense is that the statements of the letter were true, evidence on both sides of the question whether the mother was sane or insane is admissible, the fact that defendant acted reasonably and upon sufficient information not depriving plaintiff of the right to introduce proof of his mother's sanity upon the primary issue of whether the statement was true or false. *McClintock v. McClure* (Ky.) 1918E-96.

49. In an action for slander, where the title to a steer claimed by defendant and sold by the plaintiff is involved, the exclusion of testimony offered by defendant to show the nature of the plaintiff's transfer of title to the steer is error. *Cain v. Osler* (Iowa) 1918C-1126.

50. Partial justification.—In an action for circulating a libel, in which plaintiff, among other charges, is charged with abandoning and refusing to support his family while living at a certain place, it is error to withdraw

from the jury's consideration the testimony of a near neighbor that plaintiff was absent from his home half of the time, and that his family was destitute during considerable periods, and supplied with the necessities of life by the charity of neighbors, where this testimony was based on personal knowledge, obtained by the witness by visiting the home a number of times and participating in the relief given. *Morse v. Modern Woodmen of America* (Wis.) 1918D-480.

51. The exclusion of such evidence is necessarily prejudicial, especially where the jury returns a verdict of \$14,800 actual damages, and \$5,000 punitive damages. *Morse v. Modern Woodmen of America* (Wis.) 1918D-480.

52. Evidence showing different offense.—Evidence that, the parties being partners, plaintiff sold an article in his possession belonging to the firm, and refused to pay defendant any part of the profits, is not admissible in justification of a charge of larceny, it being but failure to pay a debt. *Ray v. Shemwell* (Ky.) 1918C-1122.

53. Evidence that plaintiff computed the interest on defendant's debt to him at much more than it was, and defendant, being ignorant, and relying thereon, paid it, shows, at most, obtaining property by false pretenses, defendant intending to part not only with possession thereof, but also with his right of property therein, and so is not admissible in justification of a charge of larceny. *Ray v. Shemwell* (Ky.) 1918C-1122.

54. Sufficiency of evidence.—In an action for slandering plaintiff, who was in charge of one of defendant's stores, by saying that his stock and cash were short, the evidence is held to be insufficient to show that his stock was short, or that there was a shortage in the cash, at least in such amount as would justify the inference that he had misappropriated the money, with such a degree of certainty as to warrant the court in holding as matter of law that the language complained of was true, and hence the direction of a verdict for defendant was properly denied. *Grand Union Tea Co. v. Lord* (U. S.) 1918C-1118.

e. Province of Court and Jury.

55. Privilege as question of law.—When the occasion and attending circumstances are not in dispute, the question of privilege is for the court. *Bolton v. Walker* (Mich.) 1918E-1007.

56. In an action for slander, if the court finds a quasi or qualified privilege, the questions of slander or no slander, malice or no malice, are usually for the jury; but the court must instruct as to the nature and effect of the qualified privilege, and its bearing on the jury's consideration of the facts in issue. *Bolton v. Walker* (Mich.) 1918E-1007.

f. Instructions.

57. Defining slander.—In an action for slandering a person in charge of a store by saying that his cash and stock were short, an instruction that it was sufficient to constitute

slander if the words were naturally and presumably understood to charge a crime or breach of trust or to affect plaintiff in his calling, is erroneous, as words not slanderous, but merely derogatory, tend to affect plaintiff in his trade or calling. *Grand Union Tea Co. v. Lord* (U. S.) 1918C-1118.

58. Interpretation of charges.—In an action for slandering a person in charge of a store by saying that his cash and stock were short, it is error and prejudicial to charge that, if defendant's manager spoke of plaintiff the defamatory words charged in the declaration under circumstances alleged, and if such words were false, then a recovery might be had, as it was for the jury to determine whether the language used was an accusation of crime or the imputation of conduct amounting only to irregularity or negligence, and the instruction in effect told the jury that the words spoken necessarily imputed the commission of a crime and were actionable per se, especially where the court further charged that if the manager slandered plaintiff as charged in the declaration, defendant was liable, and refused to charge that if the language used did not, according to its fair meaning under the circumstances, charge plaintiff with larceny, or if the hearers did not understand that it charged him with larceny, but that it simply charged him with some improper, negligent, or careless act, not amounting to larceny, then defendant was not guilty. *Grand Union Tea Co. v. Lord* (U. S.) 1918C-1118.

59. Such error is not cured by charging that, in determining whether or not the language used imputed a criminal offense, the words must be construed in their plain and popular sense, and that it was not necessary that the manager should have expressly charged plaintiff with larceny or a breach of trust, but that it was sufficient if the charge consisted of a statement of matters which would naturally and presumably be understood by those hearing them as charging a crime or breach of trust, or as affecting plaintiff in his trade or calling, as this implied that the words were slanderous in their plain and popular sense, and failed to make it clear to the jury that the meaning of the words was for their determination. *Grand Union Tea Co. v. Lord* (U. S.) 1918C-1118.

60. "Substantial" justification.—An instruction that it is not necessary to prove the speaking of the precise words, but that they must be "substantially" the same, means that they must be substantially the same in meaning and is proper; the word "substantially" meaning in the matter of substance rather than mere form. *Cain v. Osler* (Iowa) 1918C-1126.

61. Assumption of malice.—In an action for libel, where the publication was relieved from the presumption of malice by the fact that the letter was qualifiedly privileged, having been written by defendant to his principals in relation to their business, an instruction defining plaintiff's right of recovery, presuming the existence of malice, is prejudicial to defendant. *McClintock v. McClure* (Ky.) 1918E-96.

Ann. Cas. Dig. 1918C-E.—10.

62. Request containing propositions not covered by given instructions.—Plaintiff was in charge of one of defendant's stores, and claimed that while defendant's manager was making an inventory he told a friend of plaintiff, who inquired for plaintiff, that plaintiff was short in his cash and stock. Defendant requested an instruction, stating plaintiff's claim, and stating that defendant claimed that M., to whom the alleged slanderous statement was made, was a friend of plaintiff and lived in the same house with him; that defendant's manager was endeavoring to locate plaintiff and get some explanation of his conduct, and that the statement as to the shortage was true, and made in good faith and without malice; that proof of the truth of the statement was a complete defense; that the burden was on plaintiff to establish his case, and he must show that defendant used the language charged, and the jury must believe this language, if true, to be slanderous, or such as from its usual import was insulting and calculated to cause a breach of the peace, or there could be no recovery; and that if, after hearing the evidence, the jury believed the stock was short and the cash was also short, the verdict must be for defendant, whether the shortage was due to carelessness, ignorance, lack of attention, dishonesty, or other cause. It is held that this instruction, in substance, should have been given, as it presented defendant's theory of the case, and contained nothing objectionable, either as to matters of fact in the aspect of the facts claimed by defendant or as to the applicable rules of law, and it included propositions which defendant was entitled to have submitted when not covered by the instructions given. *Grand Union Tea Co. v. Lord* (U. S.) 1918C-1118.

63. Mitigation of damages.—In an action for libel, where defendant offers an instruction on the question of mitigation of damages, warranted by the proof, the refusal to submit the question to the jury is prejudicial error. *McClintock v. McClure* (Ky.) 1918E-96.

64. In an action for slander, where the mitigating facts tended to negative malice, an instruction that mitigating circumstances may only be considered in relation to the allowance of exemplary damages is not erroneous. *Cain v. Osler* (Iowa) 1918C-1126.

g. Damages.

65. Measure of damages.—Plaintiff, if entitled to recover for libel, should be awarded such sum, as compensatory damages, as will fairly and reasonably compensate him for any injury to his occupation or business, reputation and character, by reason of the libel and the consequent cancellation of plaintiff's bonds as cashier of a bank, etc., and for humiliation and mental distress. *McClintock v. McClure* (Ky.) 1918E-96.

66. In an action for libel in having written a letter charging plaintiff with a hereditary predisposition to insanity, etc., the measure of damages is the injury resulting from the publication of the letter, rather

than from mental suffering resulting to plaintiff from the cancellation of surety bonds on him. *McClintock v. McClure* (Ky.) 1918E-96.

67. Punitive damages.—In an action for libel based on a letter qualifiedly privileged, the jury, in their discretion, may award punitive damages, in addition to compensatory damages, not to exceed the amount claimed in the petition. *McClintock v. McClure* (Ky.) 1918E-96.

68. Verdict held excessive.—Evidence in an action for slander, where plaintiff had been charged with stealing a steer, is held to be insufficient to sustain a verdict for \$2,500. *Cain v. Osler* (Iowa) 1918C-1126.

69. In an action for circulating a circular which characterized plaintiff as a mud slinger, and stated that the tale of his life could not well be told around the neighbors' firesides, that he deserted his wife and children, and afterwards obtained a divorce on perjured testimony, that he did not visit his aged father until the death of his mother, and that his unfilial conduct so enraged his father that he disinherited plaintiff, and made plaintiff sign over his interest in the estate to his deserted wife, a verdict for \$14,800 actual damages, reduced by the trial court to \$10,000, and \$5,000 punitive damages, cannot be permitted to stand, especially where the jury, in an action against defendant's agent for circulating the same libel in Wisconsin, the state of plaintiff's residence, returned a verdict for \$1, and also in view of St. 1915, § 4569, fixing the maximum fine for a criminal libel at \$250. *Morse v. Modern Woodmen of America* (Wis.) 1918D-480.

70. In view of the surprisingly large verdict, especially as to exemplary damages, suggesting very strongly a failure to give proper consideration to the evidence, and in view of the erroneous exclusion of evidence tending to show the truth of a part of the charge, a new trial will be granted, instead of attempting to cut down the damages, and giving options to the parties to take or suffer judgment. *Morse v. Modern Woodmen of America* (Wis.) 1918D-480.

LIBERTY OF CONTRACT.

See CONSTITUTIONAL LAW, 14-16.

LICENSE.

See EASEMENTS.

Injury to licensees by electric wires, see ELECTRICITY, 1-4, 6-8, 13, 14.

Liability for injury to licensee in municipal public assembly hall, see MUNICIPAL CORPORATIONS, 22-27.

Nature of interest in burial lot, see CEMETERIES, 4.

1. Liability of licensee.—Destruction of property by fire.—The dwelling house upon plaintiff's farm was destroyed by fire while defendant was in possession of it by permis-

sion of plaintiff's tenant who was entitled to possession under his lease. Held, that defendant was a licensee and his possession not wrongful; held, further, that plaintiff was not entitled to recover for the loss without proof of negligence. *Keithley v. Hettinger* (Minn.) 1918D-376. (Annotated)

2. Even if the facts warranted the application of the doctrine, *res ipsa loquitur*, the question whether defendant was negligent was still a question of fact for the jury, and not of law for the court. *Keithley v. Hettinger* (Minn.) 1918D-376. (Annotated)

3. Plaintiff sued for the loss resulting from the fire, and, in the complaint, also set forth another independent cause of action. The jury returned a general verdict for plaintiff for the amount allowed upon the other cause of action, but included nothing therein for the loss resulting from the fire. By direction of the court they also returned a special verdict fixing the amount of loss resulting from the fire. The jury not having included such loss in the general verdict, and not having found that it resulted from the negligence of defendant, plaintiff is not entitled to judgment against defendant for the amount thereof. *Keithley v. Hettinger* (Minn.) 1918D-376.

LICENSES.

See HAWKERS AND PEDDLERS, 1-4; JUNK DEALERS AND JUNK SHOPS, 1-4; PHYSICIANS AND SURGEONS, 1-8.

Conclusiveness of statement of ownership of taxicab in registry of licenses, see AUTOMOBILES, 18.

Failure to comply with license law in regard to automobiles as barring right to recover for injuries, see AUTOMOBILES, 20, 21.

Power of committee appointed by council to arrange for display of fireworks without license, see THEATERS AND AMUSEMENTS, 4.

Validity of excise tax against foreign corporations, see CORPORATIONS, 46.

1. Distinction between police and revenue measure.—A license tax is based on the police power of the state to regulate or prohibit a particular business, and not to raise revenue, while an occupation tax is primarily intended to raise revenue. *Provo City v. Provo Meat, etc. Co.* (Utah) 1918D-530.

2. Power to regulate as including power to license.—Where power is conferred to regulate a particular business or calling, the power to license is included within the power to regulate. *Provo City v. Provo Meat, etc. Co.* (Utah) 1918D-530. (Annotated)

3. Classification.—The legislature has the right to make separate and different provisions for distinct classes and areas in the enactment of its license laws, and the exercise of such power does not conflict with the constitutional rights to the equal protection of the laws, or to due process of law, if the regulations operate equally, and the

limitations are not clearly unreasonable. *State v. Shapiro* (Md.) 1918E-196.

(Annotated)

4. Licensing of meat dealers.—In *Comp. Laws 1907*, § 206x86 (*Laws 1915*, c. 100), empowering cities to license, tax, and regulate the business conducted by merchants, butchers, etc., the word "butcher" includes the occupation of a retail meat dealer. *Provo City v. Provo Meat, etc. Co.* (Utah) 1918D-530.

(Annotated)

5. Under *Comp. Laws 1907*, § 206x43 (*Laws 1915*, c. 100), empowering cities to provide for the place and manner of sale of meats, the city has power to impose a license tax upon retail meat dealers. *Provo City v. Provo Meat, etc. Co.* (Utah) 1918D-530.

(Annotated)

6. Under *Comp. Laws 1907*, § 206, as to regulation and taxation of merchants, it is within the power of a city to impose a general merchant's license tax upon one who is engaged in a general merchandising business, including the sale of meats, and further to impose a license tax upon his business of selling meat. *Provo City v. Provo Meat, etc. Co.* (Utah) 1918D-530. (Annotated)

LIENS.

For taxes, see *TAXATION*, 35, 36.

Of building and loan association on stock of members, see *BUILDING AND LOAN ASSOCIATIONS*, 1-8.

Of judgment, see *JUDGMENTS*, 6-8.

Of attorneys, see *ATTORNEYS*, 14-16.

Perfecting lien on mortgage of stock of goods, see *CHattel MORTGAGES*, 4, 5.

Personal decree against defendant in suit to enforce lien where lien not established, see *JUDGMENTS*, 1.

Provision in building contract for retention of payments due as operating to give to subcontractor lien, see *ASSIGNMENTS*, 6.

LIFE ESTATES.

1. Creation, 147.

2. Rights of Life Tenant, 147.

3. Liabilities of Life Tenant, 148.

See *DOWER; REMAINDER AND REVERSIONS; TRUSTS AND TRUSTEES; WILLS*.

1. Creation.

1. Effect of power of appointment.—A general power of appointment conferred upon a life tenant does not enlarge his estate. *Harris v. Carolina Distributing Co.* (N. C.) 1918C-329.

2. Rights of Life Tenant.

2. Cutting or sale of timber.—Where, before the commencement of the life estate, the land has been cultivated for the produce of salable timber, the life tenant may continue the cultivation for his own profit. *Poole v. Union Trust Co.* (Mich.) 1918E-622.

3. By the common law the life tenant was narrowly restricted in the taking of timber to estovers of fuel and repairs, save where the custom of the estate was otherwise; but in this country it is the general rule to allow the life tenant to cut timber to clear the land, provided the part cleared with that under cultivation does not, as compared with the remainder of the tract, exceed the proportion of cleared to wooded land allowed by good husbandry, and that the value of the inheritance is not thereby materially lessened; and the right to the proceeds of sales of timber follows the right to cut the timber. *Poole v. Union Trust Co.* (Mich.) 1918E-622.

4. Under a testamentary trust of property, consisting in part of unproductive timber lands, to pay the income to a life tenant with remainder over on her death without issue surviving, where it appeared that there had been no lumbering business on the lands, that sales by the testatrix in her lifetime were not made in the course of selling timber, but were irregular, unconnected sales of tracts of timber, that the lands had been purchased for investment and resale, and that the inheritance would be greatly damaged if the trustees should sell the timber off the land and pay the proceeds as income to the life tenant, the proceeds of sales are a part of the principal or remainder. *Poole v. Union Trust Co.* (Mich.) 1918E-622.

5. Under such trust the taxes and expenses of carrying the unproductive timber lands, the proceeds of sales from which belonged to the principal or remainder and not to the life tenant, are to be borne by the remainderman and not by the life tenant, in exception to the general rule placing the tax burden on the life estate. *Poole v. Union Trust Co.* (Mich.) 1918E-622.

6. Working existing mine.—Where mines were opened or the leases executed before a life estate commenced, the life tenant may, in the absence of restraining words, work the mines even to exhaustion and take the profits. *Poole v. Union Trust Co.* (Mich.) 1918E-622.

7. Opening of mine.—The common-law rule that life estates, whether conventional or arising by operation of law, are impeachable for waste, unless the instrument creating a conventional life estate expresses a contrary intention, and that a life tenant cannot open new mines, does not prevail in this state. *Poole v. Union Trust Co.* (Mich.) 1918E-622.

8. Royalty on mine.—Under a will devising a share of the residue of real and personal property in trust to pay over the income to one for life, royalties on mining leases earned previous to, but payable after, the testatrix's death, are payable to the life tenant. *Poole v. Union Trust Co.* (Mich.) 1918E-622.

9. Under a will of testatrix, owning an undivided share in mineral lands under royalty leases, devising the residue of a one-half interest inherited from her former husband to their son in fee and the other half of the residue to their daughter in trust for life,

with power to the trustees to sell, reinvest, etc., and to pay the income of the principal, whatever its form, to the daughter, and with remainder over on her death without issue to the son, and in view of her expressed intention that they should enjoy the property accumulated by their father, and that testatrix had herself treated the royalties as part of her regular income, the royalties on the daughter's share are to be considered as income belonging to her, rather than as a part of the corpus of the estate. *Poole v. Union Trust Co. (Mich.) 1918E-622.*

10. Under such will, where the personal assets left by testatrix exceeded her debts and the expenses of administration, the income payable to the life tenant begins to run immediately after the death of the testatrix, and is not deferred until the trust estate is delivered by the executors to themselves as trustees. *Poole v. Union Trust Co. (Mich.) 1918E-622.*

11. Allowance from corpus.—Under a will devising life estate during widowhood, with the right to use "in addition to the income, so much of the principal as may be necessary" for the support of the widow and children and making the life tenant trustee, the life tenant is not the sole judge of what is necessary for support of herself and children, so that to warrant allowance from principal, there must be a finding by the court that it is necessary. *Hooker v. Goodwin (Conn.) 1918D-1159.* (Annotated)

12. In such case, though the widow resign as trustee, she retains her discretionary power to determine what was necessary, which cannot be disturbed, if such discretion is in fact confined to what is reasonably necessary. *Hooker v. Goodwin (Conn.) 1918D-1159.* (Annotated)

13. In such case, the trustee is bound to pay to the widow, on her application, an amount necessary for her reasonable and comfortable support, and need not first secure order of court to do so. *Hooker v. Goodwin (Conn.) 1918D-1159.*

14. In a will devising a life estate during widowhood, with the right to use, "in addition to the income, so much of the principal as may be necessary" for the support of the widow and children, "necessary" means all reasonable necessities suitable to situation and station in life of the widow, with special reference to fact that she was testator's widow. *Hooker v. Goodwin (Conn.) 1918D-1159.* (Annotated)

15. Where such will makes the life tenant trustee, her discretion, or that of the trustee appointed on her resignation, to use whatever of the principal is necessary so long as legally exercised, cannot be interfered with. *Hooker v. Goodwin (Conn.) 1918D-1159.* (Annotated)

16. Where the life tenant, under a will entitling her to so much of principal as is necessary for her support, lived prudently and economically, made necessary repairs, improved the estate, and more than doubled the principal, allowance of \$1,000 from principal of \$130,000, when she was indebted, ill, and in need of care, is held to be rea-

sonable. *Hooker v. Goodwin (Conn.) 1918D-1159.*

17. If the trustee under will devising life estate during widowhood, with the right to use "in addition to the income, so much of the principal as may be necessary" for the support of the widow and children, and making the life tenant trustee, is about to violate or has violated his trust, the law furnishes relief to the remainderman by suit on the bond required by Gen. St. 1902, § 311, of all trustees, unless excused by the will. *Hooker v. Goodwin (Conn.) 1918D-1159.*

(Annotated)

18. Reimbursement for repairs or improvements.—A life tenant is bound to maintain the real estate and buildings in a reasonable condition, and is not entitled to be repaid from the principal for moneys spent on ordinary repairs of a barn. *Hooker v. Goodwin (Conn.) 1918D-1159.*

19. But he is entitled to repayment for expense of installing a bathroom, which would on ordinary repairs of a barn. *Hooker v. Goodwin (Conn.) 1918D-1159.*

3. Liabilities of Life Tenant.

20. Payment of taxes.—The general rule is that the life tenant must pay all ordinary taxes on the property during the continuance of his estate, unless there is some provision in the instrument creating the estate relieving him of this liability. *Sheffield v. Cooke (R. I.) 1918E-961.*

21. Although ordinary taxes and the expenses of the care and management of the capital are charges on the life estate, where taxes are assessed against unproductive real estate they are not chargeable to the life tenant. *Sheffield v. Cooke (R. I.) 1918E-961.* (Annotated)

22. Taxes assessed against the unproductive part of said estate should be charged to the corpus of the estate. *Sheffield v. Cooke (R. I.) 1918E-961.* (Annotated)

23. An assessment for a public improvement not being an ordinary tax, the question whether it must be borne by the life tenant or remainderman, or apportioned between them, depends upon the circumstances and probable duration of the improvement as compared with the expectancy of life of the life tenant. *Sheffield v. Cooke (R. I.) 1918E-961.*

24. It is a general rule that municipal assessments for permanent improvements upon land are apportionable between the life tenant and the remainderman according to the circumstances of the case, their respective interest in the property, and the terms of the will or other instrument by which the life estate is separated from the remainder, and in the proportion which the value of the life estate bears to the entire estate. *Sheffield v. Cooke (R. I.) 1918E-961.*

25. Where an estate in fee simple was subject to an executory limitation and power of sale in trustees, there being no way of valuing the respective interests in the estate, the payment by the trustees of the

cost of permanent improvements out of funds realized from the sale of unproductive real estate is in itself an equitable apportionment of the assessment. *Sheffield v. Cooke* (R. I.) 1918E-961.

LIFE INSURANCE.

1. Payment of Premiums, 149.
2. Warranties and Representations, 149.
3. Construction of Policy, 149.
4. Proof of Death, 149.
5. Evidence, 149.

See BENEFICIAL ASSOCIATIONS; INSURANCE. Admissibility of evidence of amount of life insurance in action for death of insured by falling down elevator shaft, see DEATH BY WRONGFUL ACT, 14.

Admissions and declarations of insured, see ADMISSIONS AND DECLARATIONS, 3-6, 16. Presumption of death of insured, see DEATH, 1.

What law governs policy issued by foreign company, see CONFLICT OF LAWS, 2-4.

1. Payment of Premiums.

1. Taking of note as discrimination by insurer.—The acceptance by an insurer of a note for a premium thereby extending the time of payment does not constitute a violation of a statute forbidding discrimination or distinction in favor of individuals between insureds of the same class. *French v. Columbia L. etc. Co.* (Ore.) 1918D-484. (Annotated)

2. Nonpayment of premium note.—Where, after nonpayment of a premium when due and giving by insured of a note for same, which provides that if not paid when due the policy shall lapse and the note shall be due in an amount to cover only the pro rata premium to the date of cancellation, and the note is not paid when due, the policy lapses. *French v. Columbia L. etc. Co.* (Ore.) 1918D-484.

3. Waiver of forfeiture.—“A forfeiture incurred by the holder of a life insurance policy or contract is waived, if the company, with knowledge of the facts, subsequently collects premiums, dues or assessments on account of the contract, and retains them without objection until after the death of the insured.” *Modern Woodmen of America v. Berry* (Neb.) 1918D-302. (Annotated)

2. Warranties and Representations.

4. Agreement as to amount of surplus.—When a life insurance company stipulated a certain amount of surplus payable to insured after twenty years, it is immaterial that the company could not then know what surplus the policy would earn in that time. *Forman v. Mutual L. Ins. Co.* (Ky.) 1918E-880.

5. Where an insurance company in a written “illustration” attested by its officers, which it attached to plaintiff’s policy, stated a definite amount of surplus payable at the end of twenty years, the policy being silent

as to this, the company is bound to pay amount stipulated. *Forman v. Mutual L. Ins. Co.* (Ky.) 1918E-880. (Annotated)

6. Illustration of results as part of policy.—Where a written “illustration” of the surplus plaintiff would receive upon his life policy was officially attested in same handwriting as policy, as an inducement to his taking it, and was pasted to policy when plaintiff received it, it is held that it was intended as and was a part of the contract. *Forman v. Mutual L. Ins. Co.* (Ky.) 1918E-880. (Annotated)

3. Construction of Policy.

7. Occupation of insured.—A decedent who had not been employed and who had not received compensation as a bartender, though he may for another occasionally have waited upon the customers of a saloon as an accommodation to the proprietor, was not a saloon bartender within the meaning of the prohibitive provision of the contract between plaintiff, a mutual benefit insurance society, and the insured. *Modern Woodmen of America v. Berry* (Neb.) 1918D-302.

8. Attached paper.—Where a life policy is delivered by insurer with a paper attached thereto, it will be assumed that it was attached by the home office at the time policy was attested by the officers. *Forman v. Mutual L. Ins. Co.* (Ky.) 1918E-880.

9. Interest of beneficiary.—A beneficiary whose rights are dependent upon the will of the insured acquires no vested right until the death of the insured, but only a mere expectancy depending upon the will of the insured. *Rosman v. Travelers’ Ins. Co.* (Md.) 1918C-1047.

4. Proof of Death.

10. Waiver.—Where a mutual benefit insurance company refuses to furnish its forms for proof of death to plaintiff, it waives the requirement of its policy that such proofs shall be made on blanks furnished by it. *Page v. Modern Woodmen of America* (Wis.) 1918D-758.

11. Notice in plea of failure to furnish proofs of loss.—In an action against a fraternal benefit insurance organization, where the defendant admitted that proofs of death and of the plaintiff’s claim were filed in due season, received by the proper officers, acted upon, and payment refused, under circuit court rule 7, subd. “d,” providing that in suit upon an insurance policy, if the insurer shall rely on failure to furnish any proof of loss, as required by the policy, there shall be added to the plea a notice plainly indicating the facts relied on, the defense that plaintiff’s proofs of death were not satisfactory under the policy was not open to defendant, as it had given no notice thereof. *Gilechrist v. Mystic Workers, etc.* (Mich.) 1918C-756.

5. Evidence.

12. Evidence.—In an action on a policy defended on the ground of suicide, excepted

from the risks, questions concerning insured's conversations with his brother are properly excluded, where the brother was not a party, and was not produced as a witness so he could be impeached. *Rosman v. Travelers' Ins. Co. (Md.)* 1918C-1047. (Annotated)

13. Coroner's verdict not included in proofs of loss.—In an action on a life policy, where all of the proofs of death furnished by plaintiff were verified June 6th and forwarded and filed with defendant benefit association June 9th, he having on July 14th thereafter sent on to defendant at its request a copy of the coroner's verdict, such verdict is not furnished by plaintiff as part of his proofs of death, and is not admissible in evidence as an admission. *Gilchrist v. Mystic Workers, etc. (Mich.)* 1918C-756.

14. Self-serving declaration.—In an action on a policy defended on the ground of suicide excepted from the risks, the insured's statement to his wife and beneficiary in a conversation several days after the occurrence that he had made a mistake, and had taken bichloride tablets thinking that he was taking aspirin, is in the nature of a self-serving declaration and inadmissible. *Rosman v. Travelers' Ins. Co. (Md.)* 1918C-1047. (Annotated)

15. Evidence to show motive.—In an action on a policy issued to an agent, defended on the ground of suicide, excepted from the risks, evidence that the agent had delivered notes to the insurer purporting to have been given by policyholders for premiums due on policies sold, which had never been executed by the parties whose names were signed thereto, in connection with the agent's conversation that he had lost money in gambling, and had bought poison with suicidal intent, is admissible to show motive. *Rosman v. Travelers' Ins. Co. (Md.)* 1918C-1047. (Annotated)

16. Sufficiency of evidence.—Evidence in an action on a policy is held to make the insured's suicide, a risk excepted from the policy, a question for the jury. *Rosman v. Travelers' Ins. Co. (Md.)* 1918C-1047.

17. Effect of presumption of death.—Where evidence is sufficient to give rise to the legal presumption of death from absence of the insured, it is error to submit to the jury the issue whether he is dead, but plaintiff is entitled to directed verdict in her suit on a policy of mutual benefit insurance on his life. *Page v. Modern Woodmen of America (Wis.)* 1918D-756.

LIGHTING DISTRICTS.

1. Territory which may be included.—Under Act March 20, 1909 (St. 1909, p. 551), authorizing the formation of lighting districts in unincorporated towns and villages, a county board of supervisors cannot on petition of the residents of a town or village embracing sixty-four acres of land, order the incorporation of a lighting district embracing over seventy square miles of territory and 50,000 acres sparsely settled and devoted to

agricultural purposes, or vacant and unoccupied, in the country adjacent to such village or town. *People v. Van Nuys Lighting Dist. (Cal.)* 1918D-255.

2. Curative Act May 29, 1915 (St. 1915, p. 939), declaring that every lighting district established under the provisions of Act March 20, 1909 (St. 1909, p. 551), by resolution of board of supervisors, is a valid district from the date of such order, and that all proceedings be ratified, affirmed, and declared legal, is ineffective to validate the inclusion in such lighting district of large areas of farming lands. *People v. Van Nuys Lighting Dist. (Cal.)* 1918D-255.

3. Under Act March 20, 1909 (St. 1909, p. 551), authorizing the formation of lighting districts by unincorporated towns and villages, the formation of such districts is authorized only within the limits of unincorporated towns or villages, and no authority is given for the formation of a district, including large tracts of farm land not inhabited as a village; the word "town" meaning any large collection of houses and buildings, public and private, constituting a distinct place with a name, and the word "village" meaning any small aggregation of houses in the county, being, in general, less in number than in a town or city and more than in a hamlet. *People v. Van Nuys Lighting Dist. (Cal.)* 1918D-255. (Annotated)

LIGHTNING.

Judicial notice of tendency of metal to attract lightning, see EVIDENCE, 2.

Lightning stroke as industrial accident, see MASTER AND SERVANT, 12.

Lightning stroke as injury arising out of and in course of employment, see MASTER AND SERVANT, 16.

LIMITATION OF ACTIONS.

Against action for accounting of partnership affairs, see PARTNERSHIP, 7-8.

In action for death by wrongful act, see DEATH BY WRONGFUL ACT, 1-3.

Limitation of time for presentation of claim against state, see STATES, 2.

Suit by executor to set aside assignment of mortgage between attorney and client, see ATTORNEYS, 4, 5.

1. Construction of statutes.—The statute of limitations, like any other statute, is to be construed according to the manifest intention of the legislature, and, in ascertaining such intention, the language used should be construed, if possible, according to the usual meaning of the words used. *Wren v. Dixon (Nev.)* 1918D-1064.

2. Trustee and cestui que trust.—Whenever the right of action in a trustee with the legal title is barred by limitations, the right of the cestui que trust is also barred, but, if the legal title be in the cestui que trust, the statute of limitations which might run against the trustee will not constitute a

bar against the cestui if he be under disability. *Wren v. Dixon* (Nev.) 1918D-1064.

3. **Executor as trustee.**—Under Rev. Laws, § 5911, providing that every person to whom letters testamentary or of administration shall have issued shall execute a bond with a penalty not less than the value of the personal property, including rents and profits, and may be required to give an additional bond whenever the sale of realty is ordered, the relationship of trustee and cestui que trust between the executor or administrators and the heirs is not created in so far as the same might apply to the realty of an estate, so that the rule that a statute of limitations running against a trustee holding the legal title to realty runs also against the cestui does not apply. *Wren v. Dixon* (Nev.) 1918D-1064.

4. **Suit for contribution.**—A surety in whose favor the statute of limitations has not run, who has done nothing to suspend its operation, and who has been compelled to pay the debt of his principal may exact contribution from a cosurety in another state, though under the laws thereof the creditor's claim against the latter was barred when the principal's debt was paid. *Frew v. Scoular* (Neb.) 1918E-511. (Annotated)

5. **Action to recover mining claim.**—Under Act Cong. July 26, 1866, c. 262, 14 Stat. 252, providing for the patenting of mining claims, Rev. Laws, § 4951, providing that no action to recover mining claims shall be maintained unless plaintiff or those under whom he claims was seized or possessed of such claim within two years before the commencement of such action, and section 4952, providing that no cause of action upon title to real property shall be effectual unless the person prosecuting the action was seized or possessed of the premises in question within five years before the commission of the act in respect in which the action is prosecuted, and section 4953, referring to mining claims as such, enacted subsequent to the federal statute, applied to patented as well as unpatented mining claims, and an action to recover a patented claim must be commenced within two years from the time when plaintiff was seized or possessed of such claim. *Wren v. Dixon* (Nev.) 1918D-1064.

6. **Interruption of statute.**—Rev. Laws, § 4946, provides that civil actions can only be commenced within the periods prescribed in the act, after the cause of action has accrued, except where different limitation is prescribed by statute. Section 4951 provides that no action to recover a mining claim shall be maintained unless plaintiff was seized or possessed thereof within two years before the commencement of such action, defining occupation and adverse possession, and extending the provisions of the act applicable to other real estate to mining claims, provided that in such application "two years" shall be intended when "five years" is used, and section 4952 provides that no cause of action to recover real property shall be effectual, unless the person prosecuting the action was seized or possessed of the premises within "five years" before action was com-

menced, and section 4966 provides that, if one entitled to commence an action to recover real property shall be a minor, the time of disability is no part of the time limited for the commencement of such actions, which may be commenced within two years after the removal of disability. It is held that, by interpolation, section 4951 was to be read as if providing that, if a person to whom an action to recover a mining claim accrues is a minor, the period of disability shall not be part of the time limited for the commencement of such action, which may be commenced within two years after the disability ceases. *Wren v. Dixon* (Nev.) 1918D-1064.

7. **Minor heirs of one who had duly patented a mining claim** were entitled to notice of the hostile character of defendant's possession, which notice could not be given them until they were capable in law of receiving it; so that, under the statute (Rev. Laws, § 4951 et seq.), they might commence an action to recover it within two years after majority, when they were chargeable with notice. *Wren v. Dixon* (Nev.) 1918D-1064.

LIMITATION OF LIABILITY.

Of carriers of goods, see **CARRIERS OF GOODS**, 6-8.

Of carriers of live stock, see **CARRIERS OF LIVE STOCK**, 1-3.

Of telegraph company, see **TELEGRAPHS AND TELEPHONES**, 1-3.

LINEMAN.

Injury to, see **ELECTRICITY**, 5, 10, 15, 16.

LIQUORS.

See **INTOXICATING LIQUORS**.

LIQUOR SALOON.

See **WORDS AND PHRASES**, 7.

As place of public accommodation in statute forbidding denial of rights on account of race or creed, see **CIVIL RIGHTS**, 1, 2.

LIS PENDENS.

1. **Mortgagee taking possession.**—A mortgagee of personal property who takes possession thereof under an agreement with the mortgagor, pending litigation concerning a lien thereon, takes the property subject to the rights of the lien claimant as settled by the final decree or judgment. *Hubbard v. Johnson* (Wash.) 1918C-84.

(Annotated)

2. **Purchaser from party to action.**—Where the purchaser of land from a party to a pending suit involving the title thereto executes a mortgage or trust deed thereon, without warranty of title, and the title of

his grantor is thereafter decreed in such suit to be void, such purchaser's title and the lien created by him fail also, whether he was a party to the suit or not. *Linn v. Collins* (W. Va.) 1918C-86. (Annotated)

3. If the same land is later sold and confirmed by decree in such pending suit to a bona fide purchaser, who receives a deed from a commissioner of court, he may then sell to, and invest good title in, the person who previously purchased pending the suit, and if his purchase is made in good faith, he takes the land discharged of the lien which he theretofore attempted to create. *Linn v. Collins* (W. Va.) 1918C-86.

4. Such transaction does not, in the absence of other evidence, import fraud upon the creditors of such pendente lite purchaser. *Linn v. Collins* (W. Va.) 1918C-86.

5. Purchaser from person not party.—Where a lumber company, when it purchased lands, had no notice by a lis pendens that affected its title, because it did not claim under any title derived from the party in whose hands the land was attached, the record title under which the lumber company claimed being in another, while inquiry as to the title of the party from whom the lumber company bought would have disclosed to it that he had a perfect record title to the lands by virtue of his quitclaim deed from the party holding record title, though it held under a quitclaim deed, the lumber company is entitled to protection as an innocent purchaser. *Case v. Caddo River Lumber Co.* (Ark.) 1918C-80. (Annotated)

6. Failure to record deed before suit commenced.—A grantee in a deed executed by a grantee of a grantor who had previously executed a mortgage duly recorded occupies the position of a purchaser pendente lite, and he and his subsequent grantees are chargeable with notice of the foreclosure proceeding where the deed, though executed prior to the foreclosure suit, was not placed of record until more than two months thereafter, and not within the time allowed by the registry statute. *Wolfenberger v. Hubbard* (Ind.) 1918C-81. (Annotated)

7. Where a party procures a conveyance of real estate to be made to him by means of false and fraudulent representation, of which act the original vendor has no notice, and thereafter conveys such real estate to a third party, who withholds such deed from registration and recordation until after suit is filed to cancel such conveyance to his vendor, and notice of lis pendens is filed, such purchaser, under section 4261, Code 1915, is a purchaser pendente lite. *Wilson v. Robinson* (N. Mex.) 1918C-49. (Annotated)

LOAN BROKERS.

See BROKERS, 13.

LOANS.

Payment of wages by agreement with employer as entitling one to lien for employee's labor, see MECHANICS' LIENS, 6-9.

LOCAL OPTION.

See ELECTIONS.

1. Validity of statute.—Prohibition of pool halls.—The Pool Hall Law (Acts 33d Leg. c. 74 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 6319a-6319n]), providing for a petition to the commissioners' court of a county and requiring it to order an election on a petition signed by the requisite number of voters of a county precinct or political subdivision, on the question of prohibiting the maintenance of pool halls within the territory for which the election is held, and providing that, where the election is in favor of prohibition, any person thereafter operating a pool hall therein shall be subject to fine or imprisonment, is not unconstitutional as a delegation of the legislative power to enact a law, which the legislature must alone exercise. *Ex parte Mode* (Tex.) 1918E-845. (Annotated)

2. Such law does not violate Const. art. 1, § 28, restricting the power to suspend laws to the legislature, and especially prohibiting the exercise of such power by any other body; since, if there be any suspension of the law, it is a law passed by the legislature that is suspended on the happening of the contingency of a vote against its operation. *Ex parte Mode* (Tex.) 1918E-845. (Annotated)

LODGES.

See BENEFICIAL ASSOCIATIONS.

LOGS AND LUMBER.

See TREES AND TIMBER.

LOST INSTRUMENTS.

Duplication of lost stock certificate, see CORPORATIONS, 36.

1. Necessity of indemnity bond.—In an action to enforce the liability of corporate officers arising from the incurring of debts by the corporation while less than half its capital stock was subscribed, as provided for by St. 1913, § 1774n, the inclusion, in the judgment of the amount of a lost note orally proven under the provision thereof of St. 1913, § 4190, is improper, where the court did not require plaintiff to give an indemnity bond to the adverse parties under the requirement thereof of section 4191. *Weston v. Dahl* (Wis.) 1918C-922. (Annotated)

2. Presumptions and burden of proof.—In a suit by an executor to collect a note, alleged to be payable to his testator, lost and unpaid, the burden is on him to prove its due execution, contents, and loss. *Linn v. Collins* (W. Va.) 1918C-86.

3. Where the maker of such note pleads payment, he bears the burden of proving it,

as in other cases. *Linn v. Collins* (W. Va.) 1918C-86.

4. It not appearing whether the note was negotiable or not, the presumption is that it was not negotiable. *Linn v. Collins* (W. Va.) 1918C-86.

5. The due execution and contents of such note being clearly proven, the testimony of the executor that he searched for it among the papers of his testator's estate, and was not able to find it, is sufficient proof of its loss. *Linn v. Collins* (W. Va.) 1918C-86.

6. Establishment of lost will—In a proceeding to establish a pencil memorandum of a will, later duly executed but not found on testatrix's death, as a lost will, the question for the jury is whether the will was duly executed and whether it was revoked, so that refusal to instruct that a bequest to a trustee beneficiary is void under Comp. Laws 1897, § 9268, because he subscribed the will as a witness, is not error. *In re Keene* (Mich.) 1918E-367.

MACHINERY.

Right of lessee to remove machinery, see **FIXTURES**, 4-7.

MAJORITY.

Protection against unlawful acts of majority stockholders, see **CORPORATIONS**, 42.

MALICE.

As element of libel or slander, see **LIBEL AND SLANDER**, 3, 18-20, 25.

MALPRACTICE.

See **PHYSICIANS AND SURGEONS**.

MANDAMUS.

Attacking irregularities in valuation of property in mandamus to enforce order of taxing officials, see **TAXATION**, 37.

Compelling admission of pupil without fee, see **SCHOOLS**, 1.

Compelling omission from ballots of name of candidate, see **ELECTIONS**, 13.

To compel assessment or collection of taxes, see **TAXATION**, 15.

To compel granting of letters of administration, see **EXECUTORS AND ADMINISTRATORS**, 1, 4.

1. Enforcement of invalid assessment.—Since mandamus is a discretionary writ, the court will not order its issue in a case wherein it appears that the order of the state board of equalization is invalid as taking property without due process of law or for any other reason. *People v. Pitcher* (Colo.) 1918D-1185

2. Enforcement of prospective right.—The writ of mandamus will only issue to compel performance by a public officer of a duty which at that time he is bound to perform, and not to enforce a prospective right. *State v. District Board* (Wis.) 1918C-584.

Joinder of relators.—In mandamus proceedings by parents against a teacher and members of a board of education to compel respondents to admit plaintiff's children to a claimed public school without payment of a fee of \$1 a month for each pupil, the state having an interest in the education of its children, and each of the parents having a like special and peculiar interest in having the regulation exacting the fee set aside and annulled, there is no tenable objection to the joinder of the parents as petitioners. *Hughes v. Outlaw* (Ala.) 1918C-872. (Annotated)

MANSLAUGHTER.

See **HOMICIDE**, 1, 2.

MANUFACTURING ESTABLISHMENT.

As including dress making shop, see **LABOR LAWS**, 10, 11.

MARINE INSURANCE.

See **INSURANCE**.

1. Constructive total loss.—Where a German port at the outbreak of war between Germany and England puts into a neutral port and abandons the voyage, without immediate peril of capture, there is not a constructive total loss within a marine insurance policy insuring against maritime capture. *Becker v. London Assur. Corp.* (Eng.) 1918C-367. (Annotated)

MARKETABLE TITLE.

See **VENDOR AND PURCHASER**.

MARRIAGE.

1. Nature and Validity:

a. What Law Governs, 154.

b. Common-law Marriage, 154.

2. Evidence, 154.

3. Annulment, 154.

See **ALIMONY AND SUIT MONEY; DIVORCE**.

Construction of marriage settlements, see **HUSBAND AND WIFE**, 7.

Contract for marriage of third persons, see **CONTRACTS**, 2-6.

Laws governing marriage and divorce of members of Indian tribes of Oklahoma, see **INDIANS**, 2.

Offer of marriage as defense to prosecution for seduction, see **SEDUCTION**, 1.

Record of marriage license as evidence, see EVIDENCE, 21.

Validity of marriage within prescribed time of party to divorce suit, see DIVORCE, 10.

1. Nature and Validity.

a. What Law Governs.

1. Marriage within proscribed time after divorce.—A marriage in the state of New Mexico by a person divorced in Colorado within a month of the divorce if valid under the laws of New Mexico is lawful in the state of Colorado, though it would have been unlawful if solemnized in the latter state. *Crouse v. Wheeler* (Colo.) 1918E-1074.

(Annotated)

2. A valid marriage in New Mexico by a person divorced in Colorado where such marriage would be unlawful, does not render such person guilty of contempt of the court granting the divorce in Colorado. *Crouse v. Wheeler* (Colo.) 1918E-1074. (Annotated)

b. Common-law Marriage.

3. Validity.—A common-law marriage is valid in this state. *Palmer v. Cully* (Okla.) 1918E-375.

4. Prior to the adoption of the Code of 1892, a common-law marriage was recognized as lawful and binding as one contracted pursuant to license and the usual ceremony. *Howard v. Kelly* (Miss.) 1918E-1230.

5. Public assumption of relation.—Where a man and woman living in adultery changed the unlawful character of their cohabitation by public announcement that they are man and wife and assumed all the burdens incident to matrimony, especially of maintaining a home and of rearing their children, there was a valid common-law marriage between them. *Howard v. Kelly* (Miss.) 1918E-1230.

2. Evidence.

6. Presumption of validity of subsequent marriage.—Where a husband contracts a ceremonial marriage before his first wife has been absent seven years, the presumption in favor of the validity of the second marriage overcomes the presumption that the first wife was still alive when it was contracted. *Howard v. Kelly* (Miss.) 1918E-1230.

(Annotated)

7. Where a duly solemnized second marriage is shown, the presumption arises that the first wife was either divorced or dead; the burden of proof being upon the person claiming rights inconsistent with such presumption. *Howard v. Kelly* (Miss.) 1918E-1230.

(Annotated.)

8. Presumption in favor of common-law marriage.—Every presumption will be indulged in favor of the legality of a common-law marriage in the same way and to the same extent as the law indulges them in favor of a ceremonial marriage. *Howard v. Kelly* (Miss.) 1918E-1230.

3. Annulment.

9. Distinction between divorce and annulment.—“Divorce” means the dissolution of the bonds of matrimony, based upon the theory of a valid marriage, for some cause arising after the marriage; an “annulment” proceeding is maintained on the theory that for some cause existing at the time of marriage no valid marriage ever existed, even though the marriage be only voidable at the instance of the injured party. *Millar v. Millar* (Cal.) 1918E-184.

10. Applicability of divorce statute.—In view of Civ. Code, §§ 82-132, relative to nullity and dissolution of marriage and causes for denying divorce, the word “divorce,” as used in Civ. Code, §§ 128, 131, 132, providing that plaintiff in actions for divorce must be a resident, etc., does not include proceedings for annulment of marriage or any action except the original action for divorce for some cause arising after marriage. *Millar v. Millar* (Cal.) 1918E-184.

11. Secret intention to refuse marital intercourse.—The secret determination of one of the parties to a marriage, when entering into the relation, absolutely to refuse to the other sexual intercourse, a course consistently persisted in at all times after the marriage, the other party having acted in good faith, is a “fraud” within Civ. Code, § 82, subd. 4, specifying as a ground for annulment of marriage that the consent of either party was obtained by fraud, etc., since a promise made without any intent to perform constitutes actual fraud. *Millar v. Millar* (Cal.) 1918E-184.

(Annotated)

12. In a wife's suit for maintenance, the husband's cross-complaint for annulment on the ground that the wife had entered the marriage relation with the intention of refusing him sexual intercourse alleged that, owing to the wife's persistent refusal, the parties had never had marital intercourse after the marriage, and that within a reasonable time the husband notified the wife that their relations were terminated, etc., while, according to the allegations of the wife's complaint, the husband forthwith willfully failed to provide the wife with the common necessities of life or any money. It is held that the cross-complaint sufficiently negated the exception of Civil Code, § 82, subd. 4, providing that a marriage may be annulled, when the consent of either party was obtained by fraud, “unless such party afterwards with full knowledge of the facts constituting the fraud freely cohabited with the other as husband and wife.” *Millar v. Millar* (Cal.) 1918E-184.

13. Condonation as defense.—“Condonation,” the conditional forgiveness of a matrimonial offense constituting a cause for divorce, is a defense only in the ordinary divorce action for some cause arising after marriage, and the statutory provisions as to such defense have no part in a proceeding for annulment of marriage for fraud consisting in a wife's determination to deny sexual intercourse. *Millar v. Millar* (Cal.) 1918E-184.

14. Waiver of ground for annulment.—Under Civ. Code, § 82, subd. 4, making it ground for annulment of marriage if the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband and wife, if a wife entered the marriage relation intending to refuse her husband sexual intercourse, thus committing a fraud upon him, and he, with full knowledge of the facts, assumed the rights of marriage, cohabiting with his wife as such, thus forming the relation notwithstanding the fraud, he waived it, and can maintain no action for annulment on account of it. *Miller v. Millar* (Cal.) 1918E-184.

15. Effect of decree of annulment.—The decree of nullity in a proceeding to annul a marriage determines that no valid marriage ever existed. *Millar v. Millar* (Cal.) 1918E-184.

MASONS.

Exemption of Masonic Lodge from taxation, see **TAXATION**, 27.

MASTER AND SERVANT.

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2. Liability of Master for Injury to Servant:

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Employer's liability insurance, see **INSURANCE**, 30-33.

Joint or several liability of master and servant for publishing libel, see **LIBEL AND SLANDER**, 32, 33.

Liability of owner of automobile for negligence of chauffeur, see **AUTOMOBILES**, 5-11.

Liability of workman repairing walk for injuries to tenant's wife caused by negligence, see **LANDLORD AND TENANT**, 9, 10.

Lien of attorney in action brought under Federal Employer's Liability Act, see **ATTORNEYS**, 17.

Persons entitled to benefit of recovery in action for death under Federal Employers' Liability Act, see **DEATH BY WRONGFUL ACT**, 4, 15, 18.

Preferred claim for wages in bankruptcy proceedings, see **BANKRUPTCY**, 6.

Recovery by parent for loss of services resulting from injuries received by minor son for failure of employer to comply with statutory regulations, see **PARENT AND CHILD**, 2.

Unavoidable accident causing delay as excusing violation of federal hours of service act, see **LABOR LAWS**, 1.

1. Contract of Employment.

1. Time as essence of contract.—Ordinarily time is not of the essence of a contract to enter into the employment of another, unless made so by its terms, or unless it is an element of a mere condition precedent. *Lewis v. West Virginia Pulp, etc. Co.* (W. Va.) 1918D-754. (Annotated)

2. Injunction against solicitation by former employee.—One selling a laundry route and being employed by the purchaser to solicit on such route retains the right, on leaving such employ, to work for a rival laundry if he chooses, or, having established a laundry business himself, to serve all persons voluntarily offering him their trade; but in such competition he must act with the utmost fairness, resolving every doubt rather in favor of the interests of his former employer than against them. *New Method Laundry Co. v. MacCann* (Cal.) 1918C-1022. (Annotated)

3. In an injunction against a driver who had sold a laundry route to plaintiff and worked for plaintiff thereon, restraining the driver from "soliciting laundry work from" plaintiff's customers along the route, it is proper to insert the words "but not from receiving" before the words "laundry work," etc., so as not to prevent him from receiving such work unsolicited. *New Method Laundry Co. v. MacCann* (Cal.) 1918C-1022. (Annotated)

2. Liability of Master for Injury to Servant.

a. Duty to Furnish Safe Appliances and Machinery.

4. Federal boiler inspection act.—The Federal Employers' Liability Act (Act April 22, 1908, c. 149, § 4, 35 Stat. 66 [Fed. St. Ann. 1909, Supp. p. 584]) provides that in actions thereunder employees shall not be held to have assumed the risk, where the violation by the carrier of any statute enacted for the safety of employees contributed to the injury or death. The Federal Boiler Inspection Act (Act Feb. 17, 1911, c. 103, § 2, 36 Stat. 91 [Fed. St. Ann. 1912, Supp. p. 339]) provides that it shall be unlawful for interstate carriers to use any locomotive engine propelled by steam power, unless the boiler and the appurtenances thereto are in proper condition and safe to operate without unnecessary peril to life or limb, and that

all boilers shall be inspected from time to time, and be able to withstand such tests as may be prescribed thereunder. It is held that this last-mentioned act is a "statute enacted for the safety of employees," within the employer's liability act. *Great Northern R. Co. v. Donaldson* (U. S.) 1918C-581. (Annotated)

5. Boiler Inspection Act, § 2, requiring locomotive boilers to be safe for use without unnecessary peril to life or limb, and requiring them to be inspected from time to time, does not prevent liability for injury or death caused by some particular feature of construction which is in fact unsafe, though it has not been disapproved by the federal boiler inspector. *Great Northern R. Co. v. Donaldson* (U. S.) 1918C-581. (Annotated)

b. Workmen's Compensation Acts.

(1) Operation without State.

6. Workmen's Compensation Act (Consol. Laws, c. 67) does not apply to an employer who moved his plant from the state before the passage of such act, retaining only a sales agency in the state, although the employee who was injured in another state contracted with such employer while the plant was in New York. *Smith v. Heine Safety Boiler Co.* (N. Y.) 1918D-316. (Annotated)

(2) Exclusiveness of Remedy.

7. Violation by employer of "lawful requirements."—The Industrial Commission Act (103 O. L. 95) provides for the creation of an administrative board with power to supervise all places of employment, to prescribe general rules and requirements concerning all employments and places of employment and particular orders and requirements for particular employers and places of employment, to secure the lives, health, safety and welfare of every employee in such employments, and every frequenter of such places of employment. The purpose and intent of sections 15 and 16 of the act was to bring all employers within the scope of the jurisdiction and authority of the commission and to impose on them the obligation to comply with the orders and requirements of the commission when duly made. The provisions of sections 15 and 16 are not the lawful requirements referred to by, and within the meaning of, section 35, article II, of the constitution. *American Wood-ware Mfg. Co. v. Schorling* (Ohio) 1918D-318. (Annotated)

8. The term "lawful requirement," as used in section 35, article II, of the constitution, and section 29, of the Workmen's Compensation Act (103 O. L. 84), does not include a general course of conduct, or those general duties and obligations of care and caution which rest upon employers and employees, and all other members of the community, for the protection of life, health, and safety. *American Woodware Mfg. Co. v. Schorling* (Ohio.) 1918D-318.

9. By the provisions of section 25 of the Industrial Commission Act to employers generally, or to a particular employer, with reference to safe employment or place of employment, is a lawful requirement (until altered in the manner provided for in the act), for failure to comply with which, or with any statute or municipal ordinance prescribing means or methods required to be used to protect the lives, health, safety and welfare of employees, the employer under the proviso contained in section 35 article II, of the constitution, and section 20 of the Workmen's Compensation Act, is liable to an employee injured by reason of such failure. *American Woodware Mfg. Co. v. Schorling* (Ohio) 1918D-318. (Annotated)

(3) "Accident" and "Personal Injury."

10. "Loss" of foot.—Under Workmen's Compensation Law (McKinney's Consol. Laws, Book 64, § 15, subd. 3), providing for compensation in case of disability, partial in character, but permanent in quality, and that the permanent loss of the use of a foot shall be considered as the equivalent to the loss of such foot, the fact that claimant has sustained a compound fracture of the leg between the ankle and the knee does not create a presumption that he has lost the use of his foot; section 21 of the act relating to presumptions not applying, and the burden of establishing the loss being on claimant. *Modra v. Little* (N. Y.) 1918D-177. (Annotated)

11. Permanent disability.—In a proceeding for injury, under the workmen's compensation act, for the permanent loss of the use of a foot, an award of compensation as for permanent disability is held to be erroneous under the evidence, where the leg was fractured merely. *Modra v. Little* (N. Y.) 1918D-177.

12. Lightning stroke.—Where an employee of a county while engaged in work upon the public roads is killed by lightning, death results from an "industrial accident," within Workmen's Compensation Act (Laws 1915, c. 96) § 16, providing that the industrial accident fund is liable for the payment of compensation to an employee, or, in case of his death, to his dependents for injury arising out of and in the course of his employment. *Wiggins v. Industrial Acc. Board* (Mont.) 1918E-1164.

(4) Injuries Arising "Out of and in Course of Employment."

13. Under Workmen's Compensation Act (Laws 1913, p. 335), making certain employers liable for all accidental injuries sustained "arising out of and in the course of employment," it is not sufficient that the accident occur in the course of the employment, but the causative danger must also arise out of it; for the words "arising out of" refer to the origin or cause of the accident, and are descriptive of its character, while the words "in the course of" refer to the time, place, and circumstances under which the accident takes place, and by the

use of these words it was not the intention of the legislature to make the employer an insurer against all accidental injuries which might happen to an employee while in the course of the employment, but only for such injuries arising from or growing out of the risks peculiar to the nature of the work in the scope of the workman's employment or incidental to such employment, and accidents in which it is possible to trace the injury to some risk or hazard to which the employee is exposed in a special degree by reason of such employment; risks to which all persons similarly situated are equally exposed and not traceable in some special degree to the particular employment being excluded. *Mueller Constr. Co. v. Industrial Board (Ill.)* 1918E-810.

(Annotated)

14. Time of accident.—Where a construction company's foreman, reporting at the building being remodeled a half hour before the hour when the "time" of himself and men began to run, proceeds thence to another building to telephone for lumber, when he is struck by automobile, the accident happens in the course of employment; ordering materials being an incidental duty, in discharging which the use of telephone in nearby building was as much in the course of his employment as if one had been installed in the building under construction and he was using it, and a reasonable time before as well as after the actual time for which the employee is paid being allowable as included within the period of employment. *Mueller Constr. Co. v. Industrial Board (Ill.)* 1918E-810.

(Annotated)

15. In such case, his employer having acquiesced in the foreman's practice of going to public telephones to telephone for materials by repaying him amounts expended for telephone tolls, the foreman's injury arises out of his employment, since he was injured in performing a regular duty expected of him. *Mueller Constr. Co. v. Industrial Board (Ill.)* 1918E-710.

(Annotated)

16. Lighting Stroke.—An employee of a county required to work on a steel grader while a thunderstorm is threatening is not exposed to more than the normal risk which the people of the community generally are subject to, and there can be no recovery for his death from lightning under Workmen's Compensation Act (Laws 1915, c. 96) § 16, imposing liability for death from "an injury arising out of and in the course of his employment;" the words "out of" pointing to the origin of the accident, and being descriptive of the relation which the injury bears to the employment. *Wiggins v. Industrial Acc. Board (Mont.)* 1918E-1164.

(Annotated)

17. Fall from dock while returning to ship.—A maritime employee falling from a dock while returning to his ship after an absence on shore for purposes of his own does not sustain an accident arising out of and in the course of his employment within the workmen's compensation act, though both the dock and the ship were under control of

the admiralty and the employee gained entrance to the dock by virtue of an admiralty pass. *Davidson v. McRobb (Eng.)* 1918D-670. (Annotated)

(5) Notice to Employer.

18. Failure of an injured employee to give the notice of injury required by the Workmen's Compensation Law is not rendered harmless to the employer by the fact that there was no witness to the accident, nor by the fact that the injury was given proper medical treatment. *Hynes v. Pullman Co. (N. Y.)* 1918C-1040.

(6) Compensation.

19. Person working during spare time.—Where the injured employee began work during the summer, and returned to school in the fall, and each day at the end of the school session worked as a spare weaver, or spare-time worker, for approximately three hours, also working on Saturdays, there is no basis for the industrial accident board to ascertain her "average weekly wages," as defined in Workmen's Compensation Act (St. 1911, c. 751) pt. 5, § 2. *Rice's Case (Mass.)* 1918E-1052. (Annotated)

20. On such facts, the finding of the industrial accident board that, all time, except such working hours, was "lost time," within the meaning of the compensation act, cannot be sustained. *Rice's Case (Mass.)* 1918E-1052. (Annotated)

21. In the absence of evidence to show what average weekly amount during the twelve months previous to the employee's injury was being earned by a person in the same grade, employed at the same work, by the same employer, and of the average weekly wages earned by a person in the same grade, employed in the same class of employment, and in the same district, the average weekly wages of the employee cannot be ascertained by the industrial board, under Workmen's Compensation Act, pt. 5, § 2, providing that, where it is impracticable to compute the average weekly wages as above defined, regard may be had to the average weekly amount which during the twelve months previous to the injury was being earned by a person in the same grade employed at the same work by the same employer, etc. *Rice's Case (Mass.)* 1918E-1052. (Annotated)

22. The amount of compensation to be awarded an injured employee under Workmen's Compensation Act, pt. 5, § 2, is to be determined, not by what the employee is capable of earning, but by what was actually earned. *Rice's Case (Mass.)* 1918E-1052. (Annotated)

23. Compensation to be awarded an injured employee, under the workmen's compensation act, in such a case cannot be determined upon the average weekly wages of a weaver, in the absence of evidence to show the employee was a weaver; it appearing, on the contrary, that she was a spare weaver, or spare-time worker, and there being nothing to indicate the average weekly wages of

such a person. *Rice's Case* (Mass.) 1918E-1052. (Annotated)

24. If there is no such kind of employment recognized in textile manufacturing as that of spare weaver, or spare-time worker (which the injured employee was), the "average weekly wages" actually earned by one working as a spare weaver during the time she was actually employed is the basis of compensation, under workmen's compensation act; "average weekly wages," in such case, not being confined to the definition in part 5, § 2. *Rice's Case* (Mass.) 1918E-1052. (Annotated)

25. Where the definition of average weekly wages in Workmen's Compensation Act, pt. 5, § 2, is not applicable to the case of a particular employee, the words "average weekly wages," in part 2, §§ 9, 10, as to payment, should be interpreted in their common and ordinary sense, and be computed by dividing the total amount earned by the number of weeks of employment. *Rice's Case* (Mass.) 1918E-1052. (Annotated)

(7) Review.

26. *Finding of industrial board.*—Where there is evidence to support the finding of the industrial board, even though that evidence is controverted, the courts cannot pass upon its weight or sufficiency. *Mueller Constr. Co. v. Industrial Board* (Ill.) 1918E-810.

c. Employer's Relief Department.

27. *Provision for forfeiture in case of suit.*—Where a relief society's membership is confined to a certain railway's employees, and the railway contributes semiannually a sum equal to the total assessments paid by members, a by-law that half the sum insured for should be forfeited if the employee or his representative sued the railway for damages is not void under Federal Employers' Liability Act, April 22, 1908, c. 149, § 5, 35 Stat. 66 (8 Fed. St. Ann. [2d ed.] 1264), providing "any contract, rule, regulation, or device whatsoever, the purpose and intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void," since this provision does not attempt to regulate contracts between an employee and an insurance company, and even if the contract be considered one with the railway company through the society as its agent, the contract is no more than an agreement by the railway to pay an additional amount contributed by itself if suit is not brought. *Wilson v. Grand Trunk Ry. Ins. etc. Soc.* (N. H.) 1918E-1191. (Annotated)

28. *Resort to outside physician.*—Where a lumber company posts notice that it charges employees with a hospital fee of 75 cents a month after the first three days' employment, etc., and an employee pays the specified fees, there is a complete contract, requiring the company to furnish the services of its physician to the employee under the circumstances specified in the notices; it is the duty of the employee to apply for such

services before employing another physician, and his duty to use reasonable diligence to find the company's physician and request his services before employing another, and if he fails to use such diligence he cannot hold the company liable for sums paid another physician. *Crites v. Willamette Lumber Co.* (Ore.) 1918D-1050. (Annotated.)

29. Whether or not the employee used such diligence is a question of fact for the jury to determine. *Crites v. Willamette Valley Lumber Co.* (Ore.) 1918D-1050. (Annotated)

30. If an employee requiring the services of the employer's physician, the employer having contracted to furnish medical services, is ignorant as to who the physician is, it is his duty to inquire and ascertain from the employer, or, when the name and place of business or residence of the physician is known, the employee should apply where it is reasonable to suppose the doctor may be found. *Crites v. Willamette Valley Lumber Co.* (Ore.) 1918D-1050. (Annotated)

31. *Diligence in securing company physician.*—Where an employer, which contracts for consideration to furnish medical attention to its servants, holds out to them a particular person as its physician, and an employee uses reasonable diligence to secure his services in an illness, finds him absent, and, after waiting a reasonable time for his return, employs and pays another physician, the employer must reimburse him for the payment thus made to the other physician. *Crites v. Willamette Valley Lumber Co.* (Ore.) 1918D-1050. (Annotated)

32. Where the wife of the employee of a lumber company which has contracted to furnish him medical services, when he is attacked by appendicitis, goes at 8 in the morning to the residence of the company's physician and learns he is out of town, at 1:30 in the afternoon goes to a neighbor's house and telephones the doctor's residence, but is again informed that he is absent, and, being a trained nurse and becoming alarmed at her husband's condition, then calls in another doctor, who operates, there is no lack of diligence on the part of the employee or his wife, in attempting to secure the attendance of the employer's physician, such as will preclude recovery from the employer of the fees paid the other doctor. *Crites v. Willamette Valley Lumber Co.* (Ore.) 1918-1050. (Annotated)

33. *Evidence as to diligence.*—In a servant's action against his employer, who had contracted to furnish medical attendance in case of illness, for fees paid a physician other than the employer's, the latter having been absent when the servant was attacked by appendicitis, testimony of another employee that on several occasions when injured he had gone to the office of the employer's physician and found him absent, and was not directed to apply to any other physician, is properly admitted to show that the custom of the doctor, to which he testified, of keeping an attendant at his office, who, in his absence, made arrangements for the proper treatment of his patients, had not always

been observed. *Crites v. Willamette Valley Lumber Co. (Ore.)* 1918D-1050.

34. In such action, the admission of testimony of the servant's wife as to what occurred between her and the doctor's wife when the servant's wife inquired for the doctor at the family residence, if erroneous, is harmless. *Crites v. Willamette Valley Lumber Co. (Ore.)* 1918D-1050.

d. Actions for Injuries.

35. Instructions.—In an action under the federal employers' liability act for the death of an employee resulting from a boiler explosion, the court charged that the law made it unlawful for a carrier, such as defendant, to use any locomotive engine propelled by steam power, unless in proper condition and safe to operate in the service to which it was put, without unnecessary peril, and provided that no employee should be deemed to have assumed the risk, or to have been guilty of contributory negligence, by reason of any engine operated in violation of such law; that if the jury believed that the boiler in question was not in proper condition and safe to operate in the active service of defendant in moving traffic, without unnecessary peril, by reason of defendant's negligence in any of the respects alleged, then the employee did not assume the risk, and was not guilty of contributory negligence; but that if such boiler and appurtenances were in proper condition and safe for such use, but due to defendant's negligence were defective in some of the respects alleged, and the employee had actual knowledge of such defects, or they were so plainly observable that in the reasonable exercise of his faculties he should have known of them, and might be presumed to have known thereof and the danger surrounding him, then he assumed the risks and could not recover. It is held that this instruction was more favorable to defendant than the law required. *Great Northern R. Co. v. Donaldson (U. S.)* 1918C-581.

36. Questions for jury.—In an action against a railroad for its fireman's death, whether the road was negligent in maintaining its track at the curve where a derailment took place because of defective ties is held to be for the jury under the evidence. *Davis v. Cincinnati, etc. R. Co. (Ky.)* 1918E-414.

37. In an action against a railroad for its fireman's death when the engine of a train running seventy-five to eighty miles an hour was derailed, questions whether the road was running its train at a negligent rate of speed, indicating great recklessness and an utter disregard for the safety of others, especially those on the train, and whether such speed contributed to produce the accident, is held to be for the jury. *Davis v. Cincinnati, etc. R. Co. (Ky.)* 1918E-414.

38. Sufficiency of evidence.—In an action under the federal employers' liability act, the evidence is held insufficient to show an approval by government inspectors of the use of the large type of button head on the crown bolts of the boiler of oil-burning en-

gines. *Great Northern R. Co. v. Donaldson (U. S.)* 1918C-581. (Annotated)

MEASURES.

See WEIGHTS AND MEASURES.

MEAT DEALERS.

Licensing; see LICENSES, 4-6.

MECHANICS' LIENS.

1. Contract under Which Lien Acquired, 159.
2. Lienable Claims, 160.
3. Notice or Statement of Claim, 160.
4. Priority, 160.

Right of action of farm laborer for lien, destroyed by confusion of goods, see CONFUSION OF GOODS, 1.

1. Contract under Which Lien Acquired.

1. Construction of contract for retention of funds.—Under a contract with a municipality for the removal of ashes and refuse, where there is a right to file a lien for labor and materials furnished, a provision in the contract for the retention by the city of sufficient moneys with which to pay claims on which liens had been filed is for the benefit of the contractor only, and not for the protection of laborers or materialmen. *Riverside Contracting Co. v. New York (N. Y.)* 1918C-1075.

2. Failure of contract to fix time of payment.—A building contract, merely providing when seventy-five per cent of the contract price is payable, does not conform substantially to Code Civ. Proc. § 1184, providing in effect that such contracts must, by their terms, declare that at least twenty-five per cent of the contract price shall be payable at least thirty-five days after final completion; and so others than the contractor furnishing labor and material are entitled to lien for the full amount thereof. *Sweet v. Fresno Hotel Co. (Cal.)* 1918D-346.

3. Claim against fund—Necessity that work be public improvement.—Under Lien Law, § 5 (McKinney's Consol. Laws, Book 32, p. 37), providing that a plaintiff's only claim to a fund must be that the principal contract towards the completion of which materials and labor were furnished was one for a public improvement, although material furnished and services performed in constructing docks would be a public improvement if supplied under a contract with the city for that purpose, it is not when supplied and performed under a contract for the removal of ashes and refuse. *Riverside Contracting Co. v. New York (N. Y.)* 1918C-1075.

4. Under the Lien Law (Consol. Laws, c. 33) § 2 (McKinney's Consol. Laws, Book 32, p. 10), defining a "public improvement" as an improvement upon any real property belong-

ing to a municipal corporation, and an "improvement" as "the erection, alteration or repair of any structure connected with or beneath the surface, any real property and any work done upon such property, or materials furnished for its permanent improvement," a contract by a construction company with the city of New York for the removal of ashes and refuse, although the ashes were dumped and used to fill in and remake land, is not a contract for a public improvement, since the character of a contract, under the Lien Law, must be established by its substantial purpose, and not by some merely incidental result. *Riverside Contracting Co. v. New York (N. Y.)* 1918C-1075.

2. Lienable Claims.

5. Improvements by vendee under contract of sale.—Where improvements on land are made by a vendee in possession under a contract of sale, the vendor on retaking the land after a default does not take it subject to a mechanic's lien for the improvements though by the contract of sale he consented to the improvements and agreed to advance money therefor. *John A. Marshall Brick Co. v. York Farmers Colonization Co. (Can.)* 1918C-1013. (Annotated)

6. Lending money to pay wages.—One merely paying the wages of a building contractor's employees, under agreement to do so and to be repaid the same with a commission, cannot have a lien for their labor; he in effect loaning money to the contractor to enable him to carry on the work, for which there can be no lien. *Sweet v. Fresno Hotel Co. (Cal.)* 1918D-346. (Annotated)

7. Person furnishing labor and paying wages.—A contract of S. with F., building contractor, whereby S. agrees to furnish all common and carpenter labor for completion of building, and to pay all wages that may become due the carpenters and common laborers, and F. agrees for such labor furnished to pay to S. each month, with commission, the amount of wages S. has paid to such laborers during the preceding month, is one to bestow labor on the building, entitling S. to a lien for labor furnished thereunder; and not a contract for loan of money, though it is provided F. shall make out and deliver to S. weekly pay rolls, and that it is understood that all men employed shall be satisfactory to F., and that he shall have the right to discharge any unsatisfactory to him, and to replace them with others selected by him. *Sweet v. Fresno Hotel Co. (Cal.)* 1918D-346. (Annotated)

8. The value of the labor furnished by a subcontractor under contract to furnish the carpenter and common labor to complete the building, and see that such laborers worked when wanted, and attend to paying their wages, for which the subcontractor is entitled to a lien, is the amount of the reasonable wages paid to the men, with an additional sum for the value of the subcontractor's services, which the contract requires him to perform. *Sweet v. Fresno Hotel Co. (Cal.)* 1918D-346.

9. Interest paid by contractor.—A contractor cannot increase the burden of the owner by an agreement with the lien claimant, made after the work is done, to pay interest at an increased rate; but in such case, as in any other, there is right to interest at the legal rate, the amount owing, as well as the time of payment, being fixed and certain. *Sweet v. Fresno Hotel Co. (Cal.)* 1918D-346.

3. Notice or Statement of Claim.

10. A claim of lien by another than the chief contractor, containing a statement of the particulars required by Code Civ. Proc. § 1187, with nothing contradictory or destructive thereof, is sufficient. *Sweet v. Fresno Hotel Co. (Cal.)* 1918D-346.

11. Name of employer of lien claimant.—Statement in claim of lien by subcontractors, that the contract made by them with F. & Co., the contractor, was made by the latter "on behalf of and for said owner," does not vitiate the claim as not giving the name of the person by whom they were employed; the quoted phrase being manifestly inserted on the theory of the principal contract being void for failure to make twenty-five per cent of the contract price payable thirty-five days after completion, in which case Code Civ. Proc. § 1184, provides that work and material by others than the principal contractor shall be deemed done and furnished at the instance of the owner. *Sweet v. Fresno Hotel Co. (Cal.)* 1918D-346.

12. Statement of value as including profit.—There is no variance between claim of lien of subcontractors for value of work and material up to cessation of labor, estimated at contract price, stated also to be the value thereof, and evidence that this was the value of the work and material, plus twenty per cent for their profits as subcontractors. *Sweet v. Fresno Hotel Co. (Cal.)* 1918D-346.

13. Variance between statement and attached contract.—It is no ground for objection to claim of lien by S., stating that the work done by him was under contract between him and the contractor, that the contract, made a part of the claim of lien, though signed in his name, purported to be a contract of S. & Co., it appearing by the evidence that S. & Co. was merely a name under which S. was doing business, and that no one else was interested therein; it not being necessary that the claim make this explanation, but enough that it asserts the ultimate fact that he made the contract. *Sweet v. Fresno Hotel Co. (Cal.)* 1918D-346.

4. Priority.

14. Between lien claimant and assignee of fund due to contractor.—Lien Law, § 25 (McKinney's Consol. Laws, Book 32, p. 97), giving persons having liens under contracts for public improvements standing in equal degrees as collaborators or materialmen priority according to the date of filing their respective liens, even if construed in the light of section 13 (McKinney's Consol. Laws, Book 32, p. 65) providing that laborers for daily or weekly wages shall have preference over

all other claimants, does not give a lienor preference over a prior absolute assignee of moneys due under the contract. *Riverside Contracting Co. v. New York* (N. Y.) 1918C-1075. (Annotated)

15. Under Lien Law, § 25 (McKinney's Consol. Laws, Book 32, p. 97), giving persons having liens under contracts for public improvements standing in equal degrees as collaborators or materialmen priority according to the date of filing their respective liens, the exclusion of evidence offered by a laborer or materialman for the purpose of showing that his notice of lien was filed in the comptroller's office before an assignment by the contractor, was error, since the stamp of a municipal official is not conclusive proof, as between the original parties, of the time of filing a paper in his office. *Riverside Contracting Co. v. New York* (N. Y.) 1918C-1075. (Annotated)

MENTAL ANGUISH.

As element of damage in action for libel, see **LIBEL AND SLANDER**, 66.

Recovery for mental anguish because of failure to deliver death message, see **TELEGRAPHS AND TELEPHONES**, 9.

METAL.

Judicial notice of tendency of metal to attract lightning, see **EVIDENCE**.

MILEAGE.

Allowance for mileage to county commissioner, see **PUBLIC OFFICERS**, 8.

MILITARY CAMPS.

Condemnation of land for military camps, see **EMINENT DOMAIN**, 8, 14.

MILITARY LAW.

See **ARMY AND NAVY**.

MINERALS.

See **MINES AND MINERALS**.

MINES AND MINERALS.

Limitation of action to recover mining claim, see **LIMITATION OF ACTIONS**, 5-7.

Rights of life tenant as to working or opening mines or to royalties therefrom, see **LIFE ESTATES**, 6-9.

Taxation, see **TAXATION**, 6.

1. Property covered by deed of trust.—A deed of trust by a mining company of all Ann. Cas. Dig. 1918C-E.—11.

its property of every kind, real, personal, and mixed, is not restricted to property used in connection with the mines, smelter, or railroad of the grantor. *Martin v. Bankers Trust Co.* (Ariz.) 1918E-1240.

2. Evidence as to care of property of lessee.—In a replevin suit by the successor of the lessee of mining property, where the question whether plaintiff was responsible for damages to the mine by squeezing and the accumulation of water is one of the important questions in the case, testimony as to conversations between plaintiff's mine superintendent and the representative of a defendant relative to leaving a fireman in charge of the pump to keep it running, and as to similar conversations between plaintiff's mine superintendent and a party who executed the court's orders in taking possession of the mine at expiration of the lease, are admissible. *Bache v. Central Coal, etc. Co.* (Ark.) 1918E-198.

MINIMUM WAGE.

Validity of statute establishing minimum wage for women, see **LABOR LAWS**, 4, 5.

MINISTER.

Failure to administer communion as defamation of character, see **RELIGIOUS SOCIETIES**, 4.

Liability for issuance of letter forbidding communicants to read or subscribe to certain newspapers, see **RELIGIOUS SOCIETIES**, 6.

MINORITY STOCKHOLDERS.

Protection of rights, see **CORPORATIONS**, 42.

MINORS.

See **INFANTS**.

MISNOMER.

Designating legatee by nickname, see **WILLS**, 29-34, 41.

Of landowner in tax foreclosure proceeding, see **TAXATION**, 35, 36.

Waiver of misnomer of municipality, see **MUNICIPAL CORPORATIONS**, 33, 34.

MISREPRESENTATION.

See **FRAUD**; **INSURANCE**; **FIRE INSURANCE**; **LIFE INSURANCE**.

MISTAKE.

As ground for rescission, cancellation or reformation, see **RESCISSION, CANCELLATION AND REFORMATION**, 1-4, 12.

As ground for setting aside award of arbitrators, see **ARBITRATION AND AWARD**, 3-9, 11-15.

In verdict, see **VERDICT**, 5, 8, 9.

MITIGATION OF DAMAGES.

See **DAMAGES**, 1.

Duty of owner of land condemned to minimize damage to growing crops, see **EMINENT DOMAIN**, 12.

In action for libel, see **LIBEL AND SLANDER**, 63, 64.

MONEY HAD AND RECEIVED.

See **ASSUMPSIT**, 1-5.

MONOPOLIES.

1. Rule of board of trade.—In a suit to restrain a board of trade from enforcing a rule prohibiting its members from purchasing or offering to purchase grain between sessions of the board at a price other than the closing bid, as in violation of the Anti-trust Act, July 2, 1890, c. 647, 26 Stat. 209 (9 Fed. St. Ann. [2d ed.] 644) it was error to strike from the answer allegations concerning the history and purpose of such rule, and to exclude evidence on that subject, as the legality of an agreement or regulation does not depend on whether it restrains competition, and the true test of legality is whether the restraint imposed is such as merely regulates or such as may suppress or even destroy competition, and to determine that question the court must consider the facts peculiar to the business, its conditions before and after the restraint was imposed, the nature of the restraint, and its effect actual or probable. Board of Trade v. United State (U. S.) 1918D-1207. (Annotated)

2. Such rule is a reasonable regulation consistent with the provisions of the anti-trust act, where it merely restricts the period of price-making by prohibiting price-making after the close of the session, and is restricted in its operation to the purchase of grain "to arrive" or grain already in transit, which constitute a small part of the day's sales of grain, and applies only during a small part of the business day and only to grain shipped to Chicago, and not to other markets to which most of the territory tributary to Chicago is also tributary, and where it has no appreciable effect on general market prices, but helps to improve market conditions by creating a public market for grain "to arrive" in the place of private bids, by bringing more of the trading in such grain into the regular market hours, by bringing buyers and sellers into more direct relations, by distributing the business in such grain among a larger number of receivers and commission merchants, by increasing the number of country dealers, supplying them more regularly with bids, and increasing the number of bids received by them from competing markets, by

eliminating risks necessarily incident to a private market and enabling country dealers to do business on a smaller margin by enabling them to sell grain "to arrive" which they would otherwise have been obliged to ship to commission markets or sell for future delivery, by enabling Chicago grain merchants to trade on a smaller margin, and by enabling those engaged in trading in grain to arrive to fulfil their contracts by tendering grain to arrive on any railroad, whereas formerly shipments had to be made over the particular railroad designated by the buyer. Board of Trade v. United States (U. S.) 1918D-1207. (Annotated)

3. Control of price on resale.—Contracts between a manufacturer of graphophones, etc., as assignee of patents, or its agents, and all dealers permitted to sell them throughout the country, which fixed the prices at which the articles might be resold, and covenanting that underselling is an infringement of the patents, though speaking of the contract as a license, is not justified under the guise of the monopoly granted by the patent law. Boston Store v. American Graphophone Co. (U. S.) 1918C-447. (Annotated)

MORTALITY TABLES.

Judicial notice of, see **EVIDENCE**, 4.

MORTGAGES AND DEEDS OF TRUST.

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1. Mortgage by Conveyance Absolute in Form.

1. Failure of grantor to assert rights.—If, on the face of a deed and contract con-

cerning mining properties, the transaction clearly amounts to a mortgage of the properties, the mortgagee gets no title by failure of the mortgagor to assert his rights in the property as such, because once a mortgage always a mortgage. *Elling v. Fine* (Mont.) 1918C-752.

2. Effect of laches.—Defendant, who sold mining property, the buyer and his wife executing a contract to reconvey part of the property, so that prima facie the transaction was a sale with option to repurchase, is barred by laches from contending that the transaction was intended as a mortgage, a conclusion to reach which extrinsic evidence was necessary, he having stood idly by for more than thirteen years while his grantee treated the property as his own, spent money upon it, paid taxes and died, while his executors operated the property, improved it, and paid taxes, and while it passed through probate proceedings and was formally distributed. *Elling v. Fine* (Mont.) 1918C-752.

(Annotated)

3. That a grantor claiming his deed was a mortgage delayed in asserting his rights against his grantee and the latter's executor and heirs on account of lack of funds, because he "didn't want to start anything" until satisfied of his ability "to go through with it," is not an excuse for the mortgagor's laches in delaying to contend that the transaction involved was a mortgage. *Elling v. Fine* (Mont.) 1918C-752.

(Annotated)

4. Presumption.—Where the owners of mining property execute a deed conveying separate lodes and mill sites, and the grantee and his wife execute a contract, agreeing to reconvey on payment only ten lodes and mill sites, comprised in a particular group, containing no reference to a loan, no mention of any indebtedness, and no engagement by the grantors to pay or do anything, the transaction is prima facie a sale to the grantee, with an option to the grantors to repurchase. *Elling v. Fine* (Mont.) 1918C-752.

5. Burden of proof.—One claiming that a deed was intended as a mortgage has the burden of proof where resort to extrinsic evidence is necessary. *Elling v. Fine* (Mont.) 1918C-752.

2. Property and Title Conveyed.

6. Nature of mortgagee's interest.—In this jurisdiction, a mortgage on real estate is simply security for the payment of a debt, leaving the legal title to the mortgaged premises in the mortgagor. *Cleveland v. Bateman* (N. M.) 1918E-1011.

3. The Mortgage Debt.

7. Mortgage for sum greater than debt.—Though a mortgage is for a greater amount than the note secured thereby, the mortgagee's lien is in fact no greater than the amount of the note and interest thereon, and where that is satisfied out of the cash realized, he receives no title by buying in at foreclosure sale, and can convey none to a third party. *Thomas v. Scougale* (Wash.) 1918C-452.

4. Assignment of Mortgage.

8. Assignment of notes.—A bona fide holder of notes secured by deed of trust takes the deed freed from defenses which might have been urged against the original mortgagee and holder of the notes; the deed being treated as the notes. *Peninsula Bank v. Wolcott* (U. S.) 1918C-477.

(Annotated)

9. Where a bank in due course of business, without notice that the makers were insolvent, took notes secured by a deed of trust, the fact that the makers were adjudged bankrupts within less than four months does not impair the security. *Peninsula Bank v. Wolcott* (U. S.) 1918C-477.

5. Foreclosure of Mortgage.

10. Parties.—A decree of foreclosure is a nullity as to the owner of the equity of redemption not made a party defendant, but, under the registry acts, a mortgagee, whose mortgage is duly recorded, and who has no actual notice at the time he commences foreclosure proceedings, need only make a party defendant any subsequent purchaser or incumbrancer who has complied with the registry acts. *Wolfenberger v. Hubbard* (Ind.) 1918C-81.

6. Sales for Payment of Mortgage Debt.

11. Nature of power of sale.—In this jurisdiction, a power of sale contained in a real estate mortgage is coupled with an interest, hence the power is not revoked by the death of the mortgagor, notwithstanding the fact that such a mortgage merely gives the mortgagee a lien on the property or is a mere security for the debt. *Cleveland v. Bateman* (N. M.) 1918E-1011.

(Annotated)

12. Requisites of conveyance.—(a) All the essential requisites of the power contained in a mortgage must be strictly complied with.

(b) Recitals, contained in a deed executed by virtue of a power of sale contained in a mortgage, that proper notice of sale was given are prima facie proof of such facts as against the parties and privies to the instrument containing the power, and the burden of overcoming such proof rests upon the party asserting the contrary. *Cleveland v. Bateman* (N. M.) 1918E-1011.

13. In whose name executed.—A mortgagee in making a conveyance under a power in a mortgage should not execute the conveyance in his own name but in that of his principal, as the latter's attorney in fact. *Cleveland v. Bateman* (N. M.) 1918E-1011.

14. Right of mortgagee to purchase.—(a) A mortgagee, in a mortgage deed which contains a power of sale on default, cannot become a purchaser at a sale which he, himself, makes under the power, either directly or through the agency of a third person, unless expressly permitted by the terms of the instrument.

(b) A mortgagee's purchase at his own foreclosure sale, when not authorized, is voidable only, giving to the mortgagor an election

either to ratify and affirm the sale or to avoid it and have it set aside.

(c) The mortgagor's option must be exercised within a reasonable time and before the property has passed into the hands of an innocent purchaser for value and without notice. *Cleveland v. Bateman* (N. M.) 1918E-1011.

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MUNICIPAL CORPORATIONS.

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Validity of ordinance requiring payment of license by hawkers and peddlers, see HAWKERS AND PEDDLERS, 1-4.

1. Incorporation and Charter.

1. Statute giving option to city as to form of government.—Laws 1914, c. 444, setting forth a number of forms of government for cities, and authorizing any city of the second or third class to adopt any of such forms of government by a majority vote of its electors, does not violate Const. art. 3, § 1, providing that the legislative power shall be vested in the Senate and Assembly, or article 12, § 1, providing that it shall be the duty of the legislature to provide for the organization of cities and incorporated villages, or section 2, providing that laws shall not be passed, except in conformity with the constitution, or any other provision of the state or federal constitution. *Cleveland v. Watertown* (N. Y.) 1918E-574. (Annotated)

2. Laws 1914, c. 444, § 37, providing that, under any of the plans of city government therein defined, the council, subject to the provisions of that act and applicable general laws not inconsistent therewith, and also subject to the civil service law, and the provisions of all laws regulating the granting of franchises, the lease or sale of city real estate, and the incurring of municipal indebtedness, may confer by ordinance upon any officer or employee any power, or impose upon any officer or employee any duty, theretofore conferred or imposed upon any officer or employee by law, and abolish the office or employment of any officer or employee whose powers or duties have ceased, and regulate by ordinance the exercise of any power and the performance of any duty by any officer or employee, is not invalid, as it does not authorize the council to add to or take from the power already possessed by the city, but only to transfer and distribute the powers the city officially has among the officials of the new government necessary for the proper management of the city's affairs. *Cleveland v. Watertown* (N. Y.) 1918E-574. (Annotated)

3. It is within the legislative province to direct in what way, through what board of municipal officers or agents, or by what municipal officers, the powers given a city shall

be exercised. *Cleveland v. Watertown* (N. Y.) 1918E-574. (Annotated)

4. Laws 1914, c. 444, is not invalid, as delegating the power to make a charter for a city or village, as the act is complete in itself, and is in legal effect a new charter, which the city does not make, but which it accepts in place of the existing charter, and it is competent for the legislature to frame a charter and permit the electors to determine whether or not they will adopt it. *Cleveland v. Watertown* (N. Y.) 1918E-574. (Annotated)

5. Laws 1914, c. 444, is not invalid, because it delegates to cities adopting the forms of government therein specified, power to regulate assessments, public safety, health, charity, and plumbers' licenses, since, while the exercise of powers relating to these subjects in a certain sense involves state functions, as does the exercise of powers relating to all officers of every city or village, they are powers which are not committed by the constitution solely to the legislature, but such as it may commit to a locality in so far as its government is concerned. *Cleveland v. Watertown* (N. Y.) 1918E-574. (Annotated)

6. Power of municipality to attack validity.—A municipal corporations, being a creature of the legislature, cannot question the authority of its creator to amend or abrogate its charter, except in so far as the legislature attempts to exceed its own constitutional authority. But the general assembly is as well bound not to violate the mandates expressed in the constitution as a corporation created by the legislature is controlled by its statutes. Hence a municipal corporation, having authority to prosecute and defend suits in the courts, may invoke the protection afforded by the constitution to prevent a violation of its rights. The decision to the contrary in *Mayor and Council of the City of Carrollton v. Board of Metropolitan Police et al.* 21 La. Ann. 447, is overruled. *Gretna v. Bailey* (La.) 1918E-566.

2. Legislative Control.

7. Statute providing for recall of officer.—Acts 1911, p. 345, § 14, providing for recall of city commissioner under the commission form of government for the city of Mobile, created by the act, is void as violating Const. 1901, § 175, providing that municipal officers may be removed by certain courts for causes specified in section 173; since the act fixes the term of office at three years, and the additional phrase "until his successor is elected and qualified" does not make the term indefinite or uncertain, nor does section 14 operate upon the term to cut it down to an indefinite or unfixed term, but operates only upon the individual commissioner. *Williams v. State* (Ala.) 1918D-869. (Annotated)

3. Powers.

a. In General.

8. A municipal corporation possesses such

powers, and such only, as the state expressly or by necessary implication confers upon it, subject to addition or diminution by the state at its supreme discretion, since a municipality is a creature of the state, and continues its existence under the sovereign will and pleasure. *Walker v. Richmond* (Ky.) 1918E-1084.

b. Power to Contract.

9. Parties who deal with a municipal corporation are required to know the extent of its authority, and act at their peril, unless the authority exists. *Walker v. Richmond* (Ky.) 1918E-1084.

10. Retaining benefits on repudiation of ultra vires contract.—Where a municipality, in consideration of a property owner's setting his fence back twelve feet, agreed that the owners of the property should never be required to maintain a sidewalk, and that the city itself would maintain a pavement, a contract which was ultra vires, the city cannot retain the benefits of the transaction, while repudiating the contract. *Walker v. Richmond* (Ky.) 1918E-1084.

c. Power to Operate Public Utilities.

11. Maintaining ice plant and cold storage system.—The charter of the town of Arlington (Acts 1890-1891, p. 867; Acts 1905, p. 607; Acts 1913, p. 492) confers on the authorities of the municipality the power to establish and maintain an "ice plant and cold storage" within such municipality for the benefit of the inhabitants thereof, whenever they have complied with the preliminary steps for such purpose as provided by the constitution and statute laws of the state. *Saunders v. Arlington* (Ga.) 1918D-907. (Annotated)

12. Sale of fuel to inhabitants.—Rev. St. Me. 1903, c. 4, § 87, authorizing any city or town to establish and maintain a permanent wood, coal and fuel yard for the purpose of selling wood, coal, and fuel to its inhabitants at cost, does not take the property of taxpayers for private uses in violation of the Fourteenth Amendment, especially where the highest court of the state has declared such purpose to be a public one. *Jones v. Portland* (U. S.) 1918E-660. (Annotated)

4. Ordinances and Resolutions.

13. Judicial review of ordinance.—Although the action of a council in enacting ordinances under its delegated police power is subject to judicial review, yet such exercise of its discretion may be set aside by the courts only when they can say the council has acted in an arbitrary or unreasonable manner. *Pierce Oil Corp. v. Hope* (Ark.) 1918E-143.

14. Presumption of validity.—The action of a council in passing ordinances under its delegated police power is presumed to be legal, until the contrary is made to appear. *Pierce Oil Corp. v. Hope* (Ark.) 1918E-143.

15. Every intentment is to be made in favor of the lawfulness of the exercise of munic-

ipal power making regulations to promote the public health and safety, it not being the province of the courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people of the community. *Pierce Oil Corp. v. Hope* (Ark.) 1918E-143.

16. Effect of express grant.—Where the legislature, in terms, confers upon a municipal corporation the power to pass ordinances of a specified and defined character, if the power thus delegated be not in conflict with the constitution, an ordinance passed pursuant thereto cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. *Roswell v. Bateman* (N. Mex.) 1918D-426.

17. Provision not in terms local.—A municipal ordinance directed against conspiracies to injure trade, business, or commerce, and providing a penalty for violation thereof, has no extramural effect, however broad its terms, and therefore is not invalid on the ground that it is not local, special, and municipal legislation. *Hall v. Johnson* (Ore.) 1918E-49.

5. Torts.

a. Public or Governmental Functions or Duties.

18. Under common law the municipality is protected from liability only while exercising the delegated functions of sovereignty, which include police regulation, crime prevention, preservation of health, fire prevention, care of the poor, and education of the young. *Chafor v. Long Beach* (Cal.) 1918D-106. (Annotated)

19. Maintenance of pesthouse.—Where a municipal corporation maintains a pesthouse for the treatment and isolation of persons who have been exposed to or affected with smallpox, it performs a governmental duty. *Butler v. Kansas City* (Kan.) 1918D-801. (Annotated)

20. The rule that the governmental agencies of the state are not liable in an action of tort for either misfeasance or nonfeasance is applied to an action against a city to recover damages for personal injuries resulting from the defective condition of the floor of a pesthouse where plaintiff, who was affected with smallpox, was confined by the city authorities. *Butler v. Kansas City* (Kan.) 1918D-801. (Annotated)

21. Collection of garbage.—A city health commissioner while supervising the removal of garbage, and a city commissioner while authorizing and providing for its removal, are held to have been acting in a public and governmental, and not in a private or corporate, capacity. *Mountain v. Fargo* (N. D.) 1918D-826. (Annotated)

b. Private, Local or Corporate Functions or Duties.

22. Public assembly hall.—A building constructed by the city under St. 1903, p. 412,

authorizing the city to incur indebtedness for a public assembly hall, is not one enjoined upon the municipality by positive law, and the duty of maintenance is not therefore imposed by law. *Chafor v. Long Beach* (Cal.) 1918D-106. (Annotated)

23. When a municipal building is constructed and maintained not for governmental purposes, even though under permission of statute, and though maintained for the benefit of inhabitants or such of them as desired to use it, the city acts in a private proprietary capacity, and is liable for its torts. *Chafor v. Long Beach* (Cal.) 1918D-106. (Annotated)

24. While schoolhouses, city halls, jails, and fire houses are governmental instrumentalities for injuries to persons in which the city is not liable the rule does not apply to public auditoriums or other buildings, though for the benefit, convenience, or advantage of the people, and even in the case of strictly governmental buildings if the city rents portion thereof, it is liable to the tenant for negligent maintenance. *Chafor v. Long Beach* (Cal.) 1918D-106. (Annotated)

25. The true test whether a municipality is liable in tort for injuries to a person is not whether the municipality from renting its auditorium wherein the injury is caused is reaping a profit, and an act does not become governmental merely because the city from its performance reaps no profit. *Chafor v. Long Beach* (Cal.) 1918D-106. (Annotated)

26. Where the city under St. 1903, p. 412, constructs an auditorium partly over a bay, which it rents to any persons desiring the use of the same at fixed rentals for various classes of entertainments, and during a celebration by a private organization, to which all citizens are invited, the approach to the auditorium collapses, with injuries to persons, the city is liable to the same degree as if the building was owned by a private owner. *Chafor v. Long Beach* (Cal.) 1918D-106. (Annotated)

27. Degree of care required.—Where a municipal public assembly hall is rented to an organization which invites all interested persons to a celebration of Queen Victoria's birthday, a citizen who attends is not a trespasser, but a licensee by permission or invitation, and if the city is at all responsible for injuries, it is responsible for the exercise of ordinary care. *Chafor v. Long Beach* (Cal.) 1918D-106. (Annotated)

c. Torts of Officers, Agents and Employees.

28. Tort of joint special committee.—A joint special committee appointed by a city council, consisting of two members of the board of aldermen and four members of the common council, to arrange for a Fourth of July celebration and to have charge of the appropriation therefor, had no authority to admit citizens designated by a board of trade to places on the committee and subcommittees, or to allow them to join in the contract for a fireworks display, and no right under their appointment or as agents of the city to receive and expend a sum raised by outside

subscription, and such designated citizens were not the agents or representatives of the city council or of the city. *Sroka v. Halliday* (R. I.) 1918D-961.

29. The council committee, together with the other citizens whom they permitted to have places thereon, would be deemed to have acted upon their personal responsibility, and they and the outside members were subject to the same duties and liabilities in respect to one injured by fireworks used in the celebration, especially in view of their joinder in a special plea placing themselves before the court in the same attitude. *Sroka v. Halliday* (R. I.) 1918D-961.

(Annotated)

d. Notice of Claim.

30. Statement of time of accident.—Under Laws 1886, c. 572, requiring, as a condition precedent to suit, notice of intention to sue a city for personal injuries and of the "time and place at which the injuries were received" to be filed within six months after the accident, notice of injuries from defective sidewalk, stating the time of the accident as August 20th, it in fact having occurred August 20th, is insufficient. *Weisman v. New York* (N. Y.) 1918E-1023.

(Annotated)

31. Where the notice of personal injuries from defective sidewalk addressed to a city stated the time of the accident as August 20th, it having occurred August 28th, its insufficiency cannot be disregarded as not prejudicial to the city because plaintiff, on examination by the corporation's counsel before the trial, stated the accident occurred August 28th, where she subsequently served her complaint, alleging the original incorrect date of August 20th, since by her last and controlling words she authorized defendant city to believe that after all the correct date was August 20th, and that that would be he one it would be compelled to meet on the trial. *Weisman v. New York* (N. Y.) 1918E-1023.

(Annotated)

32. The insufficiency of a notice to a city of injury from defective sidewalk, because of erroneous statement of date of accident, is not waived by the injured person's being examined before trial by the corporation's counsel, at which hearing she stated the correct date. *Weisman v. New York* (N. Y.) 1918E-1023.

(Annotated)

6. Action against Municipalities.

33. Waiver of misnomer.—Where a municipality was incorporated under the name and style of the "mayor and council of the town of Arlington," with the power to sue and be sued in that name, and to a suit against the "town of Arlington" it appeared and pleaded to the merits in its true name without raising the objection of misnomer, and subsequently the petition was so amended as to designate the defendant as the "mayor and council of the town of Arlington," the error as to the name was waived by it. *Commissioners of McIntosh County v. Aiken*, 123 Ga. 647 (51 S. E. 585). See *Rhodes v. Louis-*

ville, 121 Ga. 551 (49 S. E. 681). Such waiver was binding upon citizens and taxpayers who intervened and contested the right to validate bonds of the municipality (which was the object of the suit); and it was proper to overrule a demurrer by the interveners on the ground that the suit was not brought against the municipality in its corporate name and was a mere nullity. *Saunders v. Arlington* (Ga.) 1918D-907.

34. The evidence was sufficient to support the judgment validating the bonds, and none of the assignments of error are sufficient to require a reversal. *Saunders v. Arlington* (Ga.) 1918D-907.

MUSIC.

Power of school board to provide for instruction of music, see *SCHOOLS*, 2-4.

NAMES.

See cross references given under *Misnomer*.

NATIONAL BANKS.

See *BANKS AND BANKING*.

NATURALIZATION.

See *ALIENS*, 7.

NAVY.

See *ARMY AND NAVY*.

NEGLIGENCE.

Contributory negligence of guest in automobile, see *AUTOMOBILES*, 22, 23.

Contributory negligence of person struck by automobile after alighting from street car, see *AUTOMOBILES*, 3, 4.

Imputation of negligence to person riding in automobile, see *AUTOMOBILES*, 24.

Indemnity contract as including liability for negligence, see *INDEMNITY*, 1.

Injuries to tenant's wife by reason of negligence in care of premises, see *LANDLORD AND TENANT*, 9, 10.

Liability for accidental shooting by sportsman, see *WEAPONS*, 1-5.

Liability for injuries arising from defects in streets, see *STREETS AND HIGHWAYS*, 11-15.

Liability for negligence in use of streets, see *STREETS AND HIGHWAYS*, 9, 10.

Liability for negligence in use of X-rays, see *PHYSICIANS AND SURGEONS*, 13-15.

Liability of dentist for negligence, see *PHYSICIANS AND SURGEONS*, 11, 12.

Liability of employer for negligence of independent contractor, see *INDEPENDENT CONTRACTORS*, 9-13.

Liability of municipal corporation, see **MUNICIPAL CORPORATIONS**, 18-32.

Liability of state for negligence of servants, see **STATES**, 5-8.

Liability of water company for injuries from typhoid germs in water supply, see **WATERWORKS AND WATER COMPANIES**, 4-11.

Necessity of proof of negligence in action for injury resulting from nuisance, see **NUISANCES**, 1.

Of street car conductor as cause of collision with railroad train, see **STREET RAILWAYS**, 6.

1. Invitee.—An invitee in a store is not to be too circumscribed as to his movements while waiting for a clerk to exhibit goods, but he has a right to inspect goods and frequent places used by other patrons of the store, and provided for their use by the storekeeper. *Kress v. Markline* (Miss.) 1918E-310. (Annotated)

2. Proximate Cause.—To warrant a recovery for negligence, it is incumbent on the plaintiff to allege and show that the defendant was guilty of some negligent act which was the proximate cause of the injury, since the law looks to the immediate, not to the remote, cause of damage. *Chancey v. Norfolk*, etc. R. Co. (N. C.) 1918E-580.

3. Where damage resulting from another's act does not flow naturally, legally, and with sufficient directness from such other's negligence, plaintiff is not entitled to recover. *Chancey v. Norfolk*, etc. R. Co. (N. C.) 1918E-580.

4. Contributory negligence.—To defeat a recovery because of the contributory negligence of the plaintiff, such negligence must contribute proximately as a cause of the injury but it need not be itself the proximate cause of it. *Blume v. Chicago*, etc. (Minn.) 1918D-297.

5. Failure to reply.—Where the affirmative plea of plaintiff's contributory negligence in the answer is uncontroverted, though evidence on the issue of contributory negligence is received, and a verdict rendered for plaintiff, the omission is not cured. *Lancaster Electric Light Co. v. Taylor* (Ky.) 1918C-591.

6. Burden of proof.—The law imposes on plaintiff suing for injuries caused by negligence the burden of showing by a preponderance of the evidence that the negligence was the cause of his injury, and that defendant was responsible for the negligence. *Memphis St. R. Co. v. Cavell* (Tenn.) 1918C-42.

7. In general, mere proof that an accident injurious to plaintiff has occurred does not justify a verdict or judgment imposing liability therefor upon the defendant. *Memphis St. R. Co. v. Cavell* (Tenn.) 1918C-42.

8. Condition of other similar property of defendant.—In an action for damages for death of plaintiff's intestate, caused by sinking of boat, hired of defendant, in which he and his companions had gone rowing, evidence as to condition of other boats kept for hire by defendant is inadmissible, where it tends to prove that they were in various

conditions as to repair, and little of it tended to prove boats were unseaworthy. *Clark v. Detroit*, etc. R. Co. (Mich.) 1918E-1068.

9. Question for jury.—Where the facts are such that reasonable men may differ whether there was negligence, they should be submitted to the jury. *Gibson v. Payne* (Ore.) 1918C-383.

10. The questions of contributory negligence and proximate cause are questions of fact for the jury, and the verdict of a jury determining such facts adversely to the defendant will not be set aside, unless the evidence is such that in the mind of the court reasonable men would necessarily arrive at a different conclusion, and there is no reasonable basis for them to differ in this conclusion. *Chambers v. Minneapolis*, etc. R. Co. (N. D.) 1918C-954.

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Nature of certificate of corporate stock, see **CORPORATIONS**, 35.

NEGRO.

Reference by prosecuting attorney to race of accused, see **ARGUMENT AND CONDUCT OF COUNSEL**, 2.

Statute penalizing denial of accommodation in public places on account of race, see **CIVIL RIGHTS**, 1, 2.

NEWLY DISCOVERED EVIDENCE.

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NEWSPAPERS.

Libelous statements, see **LIBEL AND SLANDER**.

NEW TRIAL.

Excessiveness of damages as ground, see **DAMAGES**, 6.

New trial in disbarment proceeding, see **ATTORNEYS**, 21.

1. Newly discovered evidence.—On the facts stated in the opinion it is held that it was error not to grant a new trial on the ground of newly discovered evidence. *Henry v. Missouri*, etc. R. Co. (Kan.) 1918E-1094.

2. Diligence.—The accused is not entitled to a new trial on the ground of newly discovered evidence tending to support his claim of alibi, where some of the evidence must have been within the knowledge of the accused, and the other could have been discovered by diligence during the five years preceding trial. *McCue v. State* (Tex.) 1918C-674.

3. Cumulative evidence.—Where several persons besides members of accused's own family testified in support of his defense of

alibi, newly discovered testimony of other outside witnesses tending to support the defense is cumulative, and affords no ground for new trial. *McCue v. State* (Tex.) 1918C-674.

4. Where there have been several trials and continuances, a new trial will not be granted on the ground of newly discovered testimony which is only cumulative. *McCue v. State* (Tex.) 1918C-674.

NOLLE PROSEQUI.

Effect of entry of nolle prosequi as to part of counts of indictment, see **APPEAL AND ERROR**, 101.

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See **DISMISSAL AND NONSUIT**.

NONSUPPORT.

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NOTES.

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See **JUDICIAL NOTICE**.

Defects in notice of appeal, see **APPEAL AND ERROR**, 14.

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Requirement of notice of claim against carrier of goods, see **CARRIERS OF GOODS**, 6-8.

Waiver of notice of claim against carriers of live stock, see **CARRIERS OF LIVE STOCK**, 3.

NUISANCES.

Right of city to remove spur tracks of street railway as nuisance, see **STREET RAILWAYS**, 5.

1. Necessity for proof of negligence.—In an action for injury resulting from a nuisance per se, no negligence need be proved. *Sroka v. Halliday* (R. I.) 1918D-961.

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Estoppel to deny legitimacy of children by inconsistent position in litigation, see **ESTOPPEL**, 2.

Liability of father for negligence of son while driving automobile, see **AUTOMOBILES**, 12, 13.

Recovery by widow as barring rights of posthumous child to recover for death of father, see **DEATH BY WRONGFUL ACT**, 8, 9.

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Settlement of bastardy proceeding as bar to action by father to recover damages for seduction, see **SEDUCTION**, 5.

Suit by divorced wife for death of child, see **DEATH BY WRONGFUL ACT**, 5.

1. Liability for tort of child.—A father is not liable for the torts of his minor or adult children simply because of the relationship. *Hays v. Hogan* (Mo.) 1918E-1127.

2. Recovery by father for loss of services.—A father may maintain an action, under the provisions of section 4992, Gen. Stat. 1909, to recover for the loss of services resulting from injuries received by his minor son by reason of the failure of defendant to comply with the statute which provides for the safety of persons employed in coal mines. (Gen. Stat. 1909, § 4987.) *Henry v. Missouri, etc. R. Co.* (Kan.) 1918E-1094.

3. Services rendered to parent.—Where a married daughter and her family, or husband, live at the house and at the expense of her mother, who, being made defendant in a suit brought by her other children for her interdiction, is provided, at her own expense, with such medical attention, nurses, and servants as she needs, and no question of paying her daughter for her care and attention is suggested, a claim therefor against the succession of the mother is properly rejected, the more especially where it appears that the daughter is one of two heirs who receive under the will of the mother one-third of a considerable estate over and above the legitime to which the law entitles them. *Pons's Succession* (La.) 1918D-939.

4. Nonsupport of child.—In a prosecution under the statute making it a criminal offense for a parent to neglect or refuse, without lawful excuse, to provide for the support of his children in destitute or necessitous circumstances, it is not a defense for a father upon whom rested the duty of providing such support to show that the necessities of the children were relieved by the interposition of others. *State v. Wellman* (Kan.) 1918D-1006.

5. Conviction of nonresident parent.—A person who has never been in this state may, under some circumstances, be rightfully convicted here of a violation of the statute making it a felony for a parent, without lawful excuse, to neglect or refuse to provide for the support of his children under the age of sixteen years who are in destitute circumstances. *State v. Wellman* (Kan.) 1918D-1006.

PARI MATERIA.

Construction of statutes in *pari materia*, see **STATUTES**, 16.

PARKS AND PUBLIC SQUARES.

1. Diversion to improper use.—Where the owner conveyed to a city land to be used as a public park only and to be improved and properly cared for as such with a dedication to the public forever, an abutting property owner can maintain a suit in equity to prevent a use of the park foreign to park purposes. *Dodge v. North End Imp. Assoc.* (Mich.) 1918E-485.

2. Erection of building in park.—Where a pavilion was erected in a public park to serve the double purpose of a waiting room for street cars and refreshment and shelter room for the public using the park, and the build-

ing was located at proper and convenient place for both purposes, such building and use were not foreign to "public park" purposes. *Dodge v. North End Imp. Assoc. (Mich.)* 1918E-485. (Annotated)

PAROL CONTRACTS.

See **CONTRACTS; FRAUDS, STATUTE OF; SALES.**

PAROL EVIDENCE.

See **EVIDENCE, 28-35.**

PAROL TRUST.

See **TRUSTS AND TRUSTEES, 1-13.**

PARTIAL INVALIDITY.

Of contract, see **CONTRACTS, 13.**

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See **INJUNCTIONS, 14, 15; QUO WARRANTO, 2-4; RESCISSION, CANCELLATION AND REFORMATION, 11.**

In suit to cancel deed from state, see **PUBLIC LANDS, 15-19a.**

Necessary parties to action for foreclosure of mortgage, see **MORTGAGES, 10.**

Nonresidence of parties defendant as affecting right to amend petition, see **PLEADING, 19.**

Substitution of parties in action by foreign corporation as trustee to foreclose deed of trust, see **CORPORATIONS, 50.**

Validity of judgment against partners in action against firm, see **PARTNERSHIP, 5.**
Weight of testimony of party, see **TRIAL, 8, 9.**

1. Virtual representation.—That one is not named as a party to a suit in equity does not necessarily prevent his being concluded by the decree, since his interest may be represented by others who are formal parties. *McClelland v. Rose (U. S.)* 1918C-341. (Annotated)

2. Where members of a class are joined as representatives of the class, such fact should appear from the record as well as the reason why the others are not brought in and the relation of those sued to the subject-matter of the suit, so as to present to the court for determination the question whether or not they properly represent others not before the court. *McClelland v. Rose (U. S.)* 1918C-341. (Annotated)

PARTNERSHIP.

Appearance by partner, see **APPEARANCE, 1.**

Death of partner as affecting appeal in suit against partnership, see **APPEAL AND ERROR, 11.**

Dissolution by war, see **ALIENS, 3.**

1. Nature.—A partnership is a distinct entity from the individuals who compose it. *Holmes v. Alexander (Okla.)* 1918D-1134.

2. Nature of title to realty.—A deed to a partnership, as such, vests the full equitable title to the land in the members of the partnership as tenants in common. *Robinson v. Daughtry (N. C.)* 1918E-1186.

3. Power of partner to convey firm realty.—While each partner is the agent of all the others and may bind himself and the other partners, such agency does not ordinarily permit one partner to convey partnership realty. *Robinson v. Daughtry (N. C.)* 1918E-1186. (Annotated)

4. Deed by partner as contract.—Where a partnership was engaged in disposing of rights to sell an article, receiving land and other property in payment and converting it into money, a deed by a partner having charge of a territory and authorized to dispose of land received by him, while not effective to pass title, is valid as a contract to convey. *Robinson v. Daughtry (N. C.)* 1918E-1186.

5. Parties to judgment.—In an action against a partnership, where service is made upon the firm only, a judgment rendered against the individuals composing the partnership is void for the reason that it is rendered against parties not before the court. *Holmes v. Alexander (Okla.)* 1918D-1134. (Annotated)

6. Right to accounting.—When a partnership business is closed out, a cause of action for an accounting and settlement arises between the partners, under an implied contract mutually and equally to share the profits and bear the burdens of the partnership. *Brooks v. Campbell (Kan.)* 1918D-1105.

7. Limitations against action for accounting.—A partnership business was closed out in April, 1908. An action for an accounting and settlement and for moneys due to one partner from the other partners was not begun until September, 1913. Held that such action was barred by the statute of limitations. (Civ. Code, § 17, subd. 2.) *Brooks v. Campbell (Kan.)* 1918D-1105. (Annotated)

8. A partnership of three members established a business at Ardmore, Okla. The business was a failure, and was closed out by the plaintiff as manager with the consent of the other partners. Two years and three months later plaintiff collected a claim against a railway company for loss of goods shipped by him to the other partners upon closing out the partnership business. Plaintiff voluntarily placed the sum collected to the credit of the defunct partnership. Held that such voluntary payment did not interrupt the running of the statute of limitations in plaintiff's own favor. *Brooks v. Campbell (Kan.)* 1918D-1105. (Annotated)

PARTY WALLS.

See **ADJOINING LANDOWNERS**, 1-3.

PASSENGERS.

See **CARRIERS OF PASSENGERS**.

PATENTS.

Control of price of patented article on resale as monopoly, see **MONOPOLIES**, 3.

Jurisdiction to determine rights under patent law, see **COURTS**, 2.

Patent of title to public lands, see **PUBLIC LANDS**, 1, 2.

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Who is "patient," see **INTOXICATING LIQUORS**, 5.

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Assignment of progress payment on public improvement contract, see **ASSIGNMENTS**, 30.

Extension of time as discharge of accommodation maker, see **BILLS AND NOTES**, 1, 2.

Extension of time for payment as consideration for contract of suretyship, 2, 3.

Necessity of return of part payment received under insurance policy in suit on policy, see **RELEASE AND DISCHARGE**, 10.

Of bequests, see **WILLS**, 52, 53.

Of premiums on life insurance, see **LIFE INSURANCE**, 1-3.

Part satisfaction by one of several tortfeasors as inuring to benefit of all, see **RELEASE AND DISCHARGE**, 7.

Right of seller of land under verbal contract to retain part payment on repudiation of contract, see **FRAUDS, STATUTE OF**, 4.

1. Check as payment.—Where a tenant mails a check for the amount of rent then due, containing a notation "Lot C," when that covered by the lease was "Lot A," not owned by the landlord, the latter must have known that the check was intended as payment for "Lot A." *Moore v. Twin City Ice, etc. Storage Co.* (Wash.) 1918D-540.

2. Waiver of objection.—Where tender of rent in the form of a check was not refused because it was not made in cash, the landlord, in his action for a forfeiture, cannot claim that the tender should have been made in money and not by check. *Moore v. Twin City Ice, etc. Storage Co.* (Wash.) 1918D-540.

PEDDLERS.

See **HAWKERS AND PEDDLERS**.

PENALTIES.

Provision for penalty in charter party as limiting recovery in case of entire repudiation of charter, see **SHIPS AND SHIPPING**, 3, 4.

PENSIONS.

1. Validity of statutes.—Pension acts to be valid can only confer pensions upon persons who at the time of receiving them are officers or employees of the municipality. *People v. Abbott* (Ill.) 1918D-450.

2. Act pensioning police officers.—Police Pension Fund Act (Laws 1909, p. 133), as amended by Laws 1913, p. 174, provides in section 1 that there shall be set apart certain moneys to constitute a police pension fund. Section 3 declares that whenever any person who at the time of the taking effect of the act is a member of the police force or who shall thereafter become a member of such force shall have served for twenty years, he shall, after having reached the age of fifty, receive a yearly pension after retirement. Section 4 provides for the payment of a pension to any policeman who has become physically disabled while in, and in consequence of, the performance of his duty. Sections 6 and 13 make other provisions with relation to the pensions: Const. art. 4, §§ 19, 20, forbid the general assembly from authorizing extra compensation to a public officer after service has been rendered or contract made, and prohibit the state from becoming responsible for the debts of or in any manner extending credit to any individual, while article 9, §§ 10, 11, declare that taxes levied by the general assembly upon municipal corporations must be uniform and that the fees and compensation of no officer shall be increased or diminished during his term. It is held that, as pensions to municipal officers are sustained on the ground of being compensation for services for which adequate compensation has not already been made and are intended to promote fidelity of service, the pension act is not in violation of such constitutional provisions. *People v. Abbott* (Ill.) 1918D-450. (Annotated)

3. In such case, as it appears that only a small percentage of the police pension fund will be derived from the salaries of such officers, and as section 4 provides for the payment of a pension at any time to a policeman physically disabled in the performance of his duty, the act must be deemed applicable to police officers in active service who had served a period of twenty years and were over the age of fifty when it went into force, though of course the act is not applicable to those who had previously retired from such service. *People v. Abbott* (Ill.) 1918D-450.

4. Police Pension Act, as amended in 1913, section 1, providing that there shall be set apart moneys to constitute the police pension fund, is mandatory; the ordinary meaning of the word "shall" being mandatory. *People v. Abbott* (Ill.) 1918D-450.

PERCOLATING WATERS.

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PEREMPTORY INSTRUCTIONS.

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PERMANENT DISABILITY.

Under insurance policy, see **ACCIDENT INSURANCE**, 1, 4.

Under Workmen's Compensation Act, see **MASTER AND SERVANT**, 11, 12.

PERMISSIVE OCCUPANCY.

By grantor as affecting right of grantee to possession, see **ADVERSE POSSESSION**, 1.

PERPETUITIES.

1. Trust to pay income for one life and twenty-one years.—A trust, whereby income was left to the testator's son for life with directions that upon the death of his son the income should be equally divided among his surviving children or the issue then living of deceased children, until the first child should reach the age of forty, and in any event not before twenty-one years after the son's death, when the principal should be divided, is not bad as a perpetuity. *Boston Safe Deposit, etc. Co. v. Collier* (Mass.) 1918C-962.

PERSONAL INJURIES.

See **CARRIERS OF PASSENGERS; DAMAGES; EXPLOSIONS AND EXPLOSIVES; LANDLORD AND TENANT; RAILROADS; STREET RAILROADS; STREET AND HIGHWAYS.**

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Indemnity against liability for malpractice in practice of dentistry, see **INSURANCE**, 23-29.

Privileged communications between physician and patient, see **WITNESSES**, 6.

Title and subject-matter of act relating to osteopathy, see **STATUTES**, 3.

1. Validity of Statutes.

1. Practice of osteopathy.—Rev. Codes, § 1596, making it unlawful to practice osteopathy without a license from board of examiners, does not make an arbitrary classification denying the right of citizens to engage in a lawful occupation, and so constitute an abuse of the police power. *State v. Hopkins* (Mont.) 1918D-956. (Annotated)

2. Inclusion of chiropractic in osteopathy.—Rev. Codes, § 1605, including in its definition of the practice of osteopathy, all treatment by use of the hands or mechanical appliances, and so including the practice of chiropractic for the purpose of requiring qualifications and a license to practice, is not an attempt to confer a monopoly on the school of osteopathy. *State v. Hopkins* (Mont.) 1918D-956. (Annotated)

3. To require a chiropractor, whose treatment is confined principally to the spine, to take an examination on anatomy and the other branches of science prescribed by Rev. Codes, § 1598, for examination of osteopaths generally, as does section 1605, by defining the practice of osteopathy so as to include the practice of chiropractic, cannot be said to have no proper relation to such practice. *State v. Hopkins* (Mont.) 1918D-956. (Annotated)

2. Construction of Statutes.

4. Right of physician to practice osteopathy.—The proviso to Rev. Codes, § 1605, defining the practice of osteopathy, that nothing in the section shall be construed to restrain a legally licensed physician or surgeon in the practice of his profession, does not permit a practitioner of medicine or surgery to practice osteopathy. *State v. Hopkins* (Mont.) 1918D-956.

3. Prosecution for Violation of Statutes.

5. Administration of anesthetic by nurse.—Ky. St. § 2613, makes it unlawful for any person to practice medicine in any of its branches in the state who has not registered a certificate of the state board of health authorizing him to engage in the practice. Section 2615, subsection 5, provides for the examination by the state board of health of

any other persons applying for authority to treat the sick or injured or in any way discharge the duties usually performed by physicians, and that the term "practice of medicine" shall not include trained or other nurses, etc. Section 2618 provides that to announce to the public in any way a readiness to treat the sick and afflicted shall be deemed to be engaging in the "practice of medicine." A duly licensed and trained nurse was employed to administer anesthetics by a duly licensed surgeon under his direction, and the administering in each case was made by her under his personal direction and supervision. It is held, that in the performance of such services the nurse was not engaged in the "practice of medicine" within the statute. *Frank v. South* (Ky.) 1918E-682.

(Annotated)

6. Information.—Information for practicing osteopathy without a license from the board of osteopathic examiners board, declared unlawful by Rev. Codes, § 1596, need not negative the defendant having procured a temporary certificate from the secretary of the board, as permitted by section 1597; such procuration being a matter of defense. *State v. Hopkins* (Mont.) 1918D-956.

7. Sufficiency of evidence.—The register of names of all applicants for license to practice osteopathy, which Rev. Codes, § 1585, requires the secretary of the board of osteopathic examiners to keep, whether they are granted or refused a license, and which such section declares to be prima facie evidence of all matters recorded therein, disclosing that one prosecuted for practicing without a license had never applied to the board for a license, nor even to the secretary, as permitted by section 1597, for a temporary license or certificate, with no evidence to contradict it, is sufficient on that point. *State v. Hopkins* (Mont.) 1918D-956.

8. Even if the allegation of the information for practicing osteopathy without a license from the board of osteopathic examiners that defendant was not a licensed practitioner of medicine or surgery is material, the register of applicants to the board of medical examiners for a certificate to practice, required by Rev. Codes, § 1586, to be kept by such board, and by such section declared prima facie evidence of all matters therein kept, and by section 7962 presumed to have been correctly kept, not showing defendant to have been an applicant, is sufficient evidence thereon. *State v. Hopkins* (Mont.) 1918D-956.

4. Compensation.

9. Construction of contract.—Where the services of a specialist are engaged under a contract that they shall be paid a certain sum in the event of certain specified possible happenings and a larger amount in the event of other happenings, they can only recover according to their contract, and, if the specified possible happenings do not happen, cannot recover the larger amount. *Pons's Succession* (La.) 1918D-939.

10. Proving nature of services.—One who seeks to recover for medical services upon the

basis of consultations at so much per consultation or per visit should be able to show how many consultations or visits were had or made. *Pons's Succession* (La.) 1918D-939.

5. Liability for Malpractice.

11. Proof of negligence of dentist.—The jury are not obliged to believe the expert testimony, though uncontradicted, that for defendant dentist to allow a tooth, while being extracted, to fall into plaintiff's throat, is consistent with due care. *Toy v. Mackintosh* (Mass.) 1918C-1188. (Annotated)

12. Though the jury in an action against a dentist for permitting plaintiff, while unconscious, to swallow a tooth being extracted, may disregard the expert testimony for defendant that the tooth had nothing to do with plaintiff's condition afterwards, yet whether hemiplegia, aphasia, and plaintiff's weakened condition and inability to work, with which, after the accident, he was afflicted, might be the result thereof, not being a matter of common knowledge and observation, but depending on affirmative proof, with the burden on plaintiff, the jury may not find such connection, in the absence of testimony, other than that soon after the accident these conditions arose. *Toy v. Mackintosh* (Mass.) 1918C-1188. (Annotated)

13. Injury by use of X-ray.—The evidence is sufficient to sustain a finding that an injury to the person of the plaintiff was the result of a burn coming from the taking of an X-ray. *Holt v. Ten Broeck* (Minn.) 1918E-256. (Annotated)

14. There was evidence having a tendency to prove the defendant negligent in the operation of the X-ray apparatus; and it being wholly under his control and the injury not being one naturally resulting when the apparatus was properly used, the rule of *res ipsa loquitur* applies. This rule does not shift the burden of proof of the defendant, but permits the jury to draw an inference of negligence from the result. *Holt v. Ten Broeck* (Minn.) 1918E-256. (Annotated)

15. The X-ray was not applied for curative purposes. In determining negligence in the operation of an X-ray machine, the test is that of ordinary care, and it is not a matter of importance whether one operating it is a physician. *Holt v. Ten Broeck* (Minn.) 1918E-256. (Annotated)

PICKETING.

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Plea of non est factum in action on bond of sheriff, see SURETYSHIP, 4.

Striking out unnecessary special plea in action on bond of public officer, see SURETYSHIP, 7.

1. Construction of Pleadings.

1. Construction against pleader.—Any pleading, whether at law or in equity, is to be most strictly construed against the pleader thereof, and this principle applies with especial force to a plea which is in the nature of a confession and avoidance, and, where such a plea has on the face of it two intendments, it must be construed most strongly against the party who pleads it. *Florida East Coast R. Co. v. Peters* (Fla.) 1918D-121.

2. Complaint or Declaration.

2. Averment of promise to pay.—A special count in a declaration in assumpsit, counting upon an original and a second or modified contract, and which after averring both contracts charges a promise on the part of the defendant to pay the amount accrued to plaintiff under the contracts pleaded, is not rendered bad on demurrer because of its omission to charge a promise to pay "the sum of ——— dollars" alleged in a previous paragraph to be due under the first or original contract pleaded. *Parkersburg, etc. Sand Co. v. Smith* (W. Va.) 1918E-449.

3. Nor is such count bad on demurrer for failure to aver a promise of defendant to pay respectively the two several sums demanded, one accruing to plaintiff under the contracts in writing pleaded, and the other under other

contracts pleaded, but not in writing, such promises being comprehended under the general averment, of a promise to pay a sum larger than the aggregate of both items, intended and sufficient to cover both sums sued for. *Parkersburg, etc. Sand Co. v. Smith* (W. Va.) 1918E-449.

4. Nor is such count bad on demurrer, because it avers a promise to pay interest on the sum sued for from a date anterior to the making of the second of said contracts, interest being incident merely to the right to recover the principal sum sued for. *Parkersburg, etc. Sand Co. v. Smith* (W. Va.) 1918E-449.

3. Plea or Answer.

5. Nature of plea in confession and avoidance.—A plea in justification or excuse admits the facts alleged by the plaintiff, but in effect denies that the plaintiff had at any time a good cause of action, either because the conduct of the defendant is justified in law, or because he is excused from liability in the particular case through some act or conduct of the plaintiff. *Florida East Coast R. Co. v. Peters* (Fla.) 1918D-121.

6. Requisites of plea.—All matter in confession and avoidance must be pleaded specially, the plea must confess the facts pleaded, and the plea must avoid, and the avoidance must be pleaded coextensive with the confession, and must be an answer to the whole of what is adversely alleged. *Florida East Coast R. Co. v. Peters* (Fla.) 1918D-121.

7. Necessity of answering all counts.—Where a plea in the nature of confession and avoidance interposed to an entire declaration, consisting of a number of counts, is found to answer only some of such counts, it is demurrable. *Florida East Coast R. Co. v. Peters* (Fla.) 1918D-121.

8. Necessity of special plea.—In an action on the case, since the adoption by this court of rules 71 and 72 of the rules of circuit court in common-law actions, the defendant has the right to file the plea of not guilty together with special pleas in the nature of confession and avoidance, and, if he would avail himself of the benefit of certain matters of defense, he must file such special pleas. *Florida East Coast R. Co. v. Peters* (Fla.) 1918D-121.

9. Requisites of plea in bar.—A plea in bar of the plaintiff's action must be certain to a common intent; it must be direct and positive in the facts set forth, and must state them with necessary certainty; and a plea which professes to be to the entire declaration, but omits to answer a material part thereof, is bad on demurrer. *Florida East Coast R. Co. v. Peters* (Fla.) 1918D-121.

10. Duplicity.—Every plea must be simple, entire, connected, and confined to a single point. A plea which contains more than one independent fact, or set of facts, either of which alone is a sufficient answer to the declaration, is bad for duplicity, whether the defense is in bar, or in abatement, or in both. *Florida East Coast R. Co. v. Peters* (Fla.) 1918D-121.

4. Demurrer.

11. Relation back.—A demurrer to an affirmative defense enables the defendant to question the sufficiency of the complaint. *Manson v. Curtis* (N. Y.) 1918E-247.

12. Effect as admission.—Demurrer to an answer admits the facts pleaded. *Walker v. Richmond* (Ky.) 1918E-1084.

13. When a pleading is challenged by demurrer, the court must assume that its allegations are true. *Paulson v. Weeks* (Ore.) 1918D-741.

14 Pleading good in part.—Demurrer to answer as a whole, good so far as it denies averments of the petition, is properly overruled, though the attempted justification in the answer of part of the alleged slander is insufficient. *Ray v. Shemwell* (Ky.) 1918C-1122.

5. Reply.

15. Departure.—A plaintiff cannot allege that he has fully complied with a contract, and later shift his ground by replying that the omissions charged in defendant's answer were waived. *Waller v. New York Ins. Co.* (Ore.) 1918C-139.

6. Amendment of Pleadings.

a. Allowance of Amendment.

16. Necessity that cause of action be stated.—An amendment to a complaint will not be permitted where the complaint, even if so amended, would fail to state a cause of action, under the general rule that amendments to pleadings should be permitted in furtherance of justice. *Davis v. State* (Idaho) 1918E-911.

17. Amendment of no avail.—Under section 1, c. 7, Hurd's Rev. St. 1915-16, giving power to permit amendments for furtherance of justice, etc., an amendment to an affidavit of merit, which is essential to the proper presentation of a defense, should be permitted, although the allowance of an amendment under this section is largely discretionary with the trial court, and an amendment which would be of no benefit to the party seeking it need not be allowed. *Scovill Mfg. Co. v. Cassidy* (Ill.) 1918E-602.

18. In a suit on guaranty, the refusal to permit an affidavit of merit to be amended to categorically deny the manufacture and delivery of articles covered by the guaranty, in order to place upon plaintiff the burden of proving such facts, was not injurious to defendant, where the proof in the record showed that plaintiff had delivered such goods of value exceeding the guaranteed sum. *Scovill Mfg. Co. v. Cassidy* (Ill.) 1918D-602.

19. Effect of nonresidence of parties.—A petition which fails to state a cause of action may be amended so as to make it state a cause of action, although some of the defendants may not be residents of the county in which the petition is filed and may be attacking the jurisdiction of the court because of such nonresidence. *Wells v. Hansen* (Kan.) 1918D-230.

b. Time of Amendment.

20. Amendment on appeal.—Where plaintiffs have a cause of action, but have mistaken their remedy, the supreme court may, under St. 1915, § 2836b, authorize amendments of pleadings on appeal. *State v. District Board* (Wis.) 1918C-584.

21. Nunc pro tunc order after judgment.—A nunc pro tunc order cannot be made solely on affidavits, but must have some record evidence therefor, so that after verdict and judgment for plaintiff the court cannot enter, on affidavits by counsel, a nunc pro tunc order traversing on the record an affirmative allegation of the answer. *Lancaster Electric Light Co. v. Taylor* (Ky.) 1918C-591.

c. Effect of Amendment.

22. Under sections 4160 and 4171, Code 1915, in every amendatory or supplemental pleading filed by a party, it is necessary for him to therein restate his entire cause of action, defense, or reply, and all matters set forth in his original pleading and not carried forward into his amended or supplemental pleading are abandoned, and a judgment for the defendant dismissing a cause on the merits is res adjudicata only as to such matters as were carried forward by a plaintiff into his amended or supplemental complaint. *Albright v. Albright* (N. Mex.) 1918E-542.

7. Issues and Variance.

23. Plaintiff suing for injuries caused by negligence is under the burden that his proof in substance shall correspond with the averments of his pleadings. *Memphis St. R. Co. v. Cavell* (Tenn.) 1918C-42.

24. Unnecessary allegations.—Where plaintiff's petition, in an action for damages for fraudulent manipulation of a popularity contest, is in two counts, one of conspiracy, and another for breach of an implied contract, failure to support the first does not defeat the action, but it is sufficient if other allegations constituting the second cause of action are sustained, since failure to prove unnecessary allegations cannot defeat an action. *Smead v. Stearns* (Iowa) 1918C-745.

8. Verification.

25. Waiver.—Although section 110 of the Civil Code requires that the answer to a petition in an action founded on a written instrument for the unconditional payment of money shall be verified, the verification is waived when the plaintiff joins issue on the answer, introduces evidence contradicting such defense, and asks instructions covering his theory of the law pertaining thereto. *Emery v. Bennett* (Kan.) 1918D-437.

(Annotated).

PLEDGE.

Priority of pledge of stock to lien of building and loan association, see BUILDING AND LOAN ASSOCIATIONS, 1-8.

1. Mortgage or pledge.—The transfer of title of incorporeal property is generally an essential part of the delivery of it in pledge, and if there is a doubt whether it is a pledge or a mortgage the law favors the conclusion that it is a pledge. *Martin v. Bankers' Trust Co. (Ariz.)* 1918E-1240.

2. An assignment of corporate stock as collateral security, though transferring title to the stock, is a pledge and not a chattel mortgage. *Martin v. Bankers' Trust Co. (Ariz.)* 1918E-1240.

3. Consideration.—A pre-existing indebtedness is a sufficient consideration to sustain an assignment of corporate stock as security. *Martin v. Bankers' Trust Co. (Ariz.)* 1918E-1240.

4. Foreclosure.—Sale of several parcels together.—On the foreclosure of a pledge of shares of stock of a smelting company and a railroad company, it is not error to sell the shares of the two companies together where the court finds it will be for the best interests of all parties. *Martin v. Bankers' Trust Co. (Ariz.)* 1918E-1240.

POLICE OFFICERS.

Conductor and motorman as policeman, see CARRIERS OF PASSENGERS, 4.

Validity and construction of act pensioning police officers, see PENSIONS, 2, 4.

POLICE POWER.

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Validity of statute prohibiting assignment of claim to nonresident, see ASSIGNMENTS, 1.

POLITICAL PARTY.

Definition, see WORDS AND PHRASES, 8.

POOL HALLS.

Validity of statute providing for local option as to question of prohibition of pool halls, see LOCAL OPTION, 1, 2.

POSSESSION.

See ADVERSE POSSESSION.

POSTNUPTIAL AGREEMENT.

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POWER COMPANIES.

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Ann. Cas. Dig. 1918C-E.—12.

POWERS.

Effect of war on irrevocable power of attorney, see ALIENS, 4.

Power of appointment as enlarging estate of life tenant, see LIFE ESTATES, 1.

Power of attorney, see AGENCY, 5.

Power of sale in mortgage, see MORTGAGES, 11-14.

1. Specific performance of contract to exercise power by will.—Equity will not specifically enforce a contract to exercise a power of appointment by will in favor of one who advanced money to the donee of the power, since the power to appoint by will implies that it shall be the will of the donee of the power at the time of his death, and such power cannot be executed by grant under Real Property Law (Consol. Laws, c. 50) §§ 167, 168, and to permit it to be exercised by specific performance of a contract would be, in effect, to permit its exercise by grant. *Farmers' Loan, etc. Co. v. Mortimer (N. Y.)* 1918E-1159. (Annotated)

2. Equity will not declare a trust on property appointed under a will in favor of one to whom the donee of the power contracted to appoint, where the property involved was not the property of the donee, but the property of another over which he had only the power to appoint by will. *Farmer Loan, etc. v. Mortimer (N. Y.)* 1918E-1159. (Annotated)

PRACTICE.

See ACTIONS AND PROCEEDINGS; DISMISSAL AND NONSUIT; PLEADING; TRIAL.

PRACTICE OF LAW.

Validity of contract contemplating practice of law by corporation, see CONTRACTS, 15.

PREMISE.

Construction of habendum clause with premises, see DEEDS, 5.

PREMIUMS.

Payment, see LIFE INSURANCE, 1-3.

PRESCRIPTION.

Creation of rights in division wall by prescription; see ADJOINING LANDOWNERS, 3.

PRESCRIPTIONS.

Furnishing prescription for intoxicating liquors, see INTOXICATING LIQUORS, 4-7, 14.

PRESENCE.

Right of accused to be present at trial, see **CRIMINAL LAW**, 4-11.

PRESUMPTIONS.

See **EVIDENCE**, 36-38 and cross-references there given.

Validity of statute creating presumption of fact, see **EVIDENCE**, 44.

PRICE FIXING.

Control of price of patented article on resale as monopoly, see **MONOPOLIES**, 3.

PRIEST.

Failure to administer communion as defamation of character, see **RELIGIOUS SOCIETIES**, 4.

Liability for issuance of letter forbidding communicants to read or subscribe to certain newspapers, see **RELIGIOUS SOCIETIES**, 6.

PRIMARY ELECTIONS.

See **ELECTIONS**, 5-13.

PRINCIPAL AND AGENT.

See **AGENCY**.

PRINCIPAL AND SURETY.

See **SURETYSHIP**.

PRIVILEGED COMMUNICATIONS.

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As affecting liability for libel or slander, see **LIBEL AND SLANDER**, 10-28.

PRIVILEGES AND IMMUNITIES.

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PROCEEDINGS.

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PROCESS.

In garnishment proceedings, see **GARNISHMENT**, 2.

In proceeding under Torrens Act, see **RECORDING ACTS**, 7.

Service of process against foreign corporations, see **CORPORATIONS**, 51-53.

PROFESSION.

See **ATTORNEYS; LICENSES; PHYSICIANS AND SURGEONS**.

PROFITS.

As element of loss under insurance contract, see **FIRE INSURANCE**, 19.

PROMISSORY NOTES.

See **BILLS AND NOTES**.

PROPONENT.

Evidence as to conduct, see **WILLS**, 20.

PRO RATA.

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PROSECUTING ATTORNEYS.

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District attorney as party to divorce suit, see **DIVORCE**, 3-5.

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PROXIMATE CAUSE.

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Of damage to goods in carrier's hands by freezing, see **CARRIERS OF GOODS**, 5.

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PROXY.

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PUBLIC ACCOMMODATION.

Statute forbidding denial of rights, see **CIVIL RIGHTS**, 1, 2.

PUBLIC ASSEMBLY HALL.

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PUBLICATION.

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Purchaser of fraudulent patent as bona fide purchaser, see **VENDOR AND PURCHASER**, 17.

1. Grant by State.

1. The state is the source of title, and a patent issued under its authority, regular on its face, confers legal title. *Hennessy v. Blair* (Tex.) 1918C-474.

2. Wrongful procurement of patent.—Where the officers of the state issued a patent on a forged assignment of an unlocated land certificate, their erroneous action is, at most, only voidable. *Hennessy v. Blair* (Tex.) 1918C-474.

3. Ratification of deed secured by fraud.—It should not be assumed that the legislature has ratified sales of school lands secured by gross fraud unless the language of the statute leads unmistakably to that conclusion. *State v. Hyde* (Ore.) 1918E-688.

4. Sess. Laws 1899, p. 164, § 27, directed the state land board, which had been author-

ized to lend the school funds on far mortgages, to foreclose all mortgages which were not adequate security and bid in the lands at its true cash value, but through mistake did not empower the board to sell land so purchased. Laws 1901, p. 304, authorized the board to bid in lands sold under foreclosure of mortgage given to secure a loan from the school fund, and provided that such lands should be held for sale and sold as opportunity might offer on the best terms obtainable, and that all sales of land theretofore made by the board were thereby ratified and confirmed, and whenever the full purchase price should have been paid title in fee simple should vest in the purchasers and their successors and assigns. It is held, that this was passed to correct the error in the Act of 1899 and related to purchases made by the state on the foreclosure of school fund mortgages and authorized sales thereof and confirmed sales theretofore made, and had no reference to sales of the state's grant lands and was not intended to confirm fraudulent purchases of such grant lands. *State v. Hyde* (Ore.) 1918E-688.

2. Land Department.

5. Effect of decision.—As the administration of the forest reserve act is vested in the land department, the question whether a relinquishment of lands incorporated in a forest reserve, the owner selecting other lands in lieu thereof, is sufficiently in compliance with the rules to be accepted is solely for the land department. *State v. Hyde* (Ore.) 1918E-688. (Annotated)

6. Under the regulations of the interior department, a selector of unsurveyed public lands acquires an inchoate right thereto which on survey and compliance with the rules entitles him to a patent; hence the title to base lands included in a forest reserve and relinquished in lieu of other lands is not subject to attack on the theory that there could be no relinquishment because the lieu lands were unsurveyed. *State v. Hyde* (Ore.) 1918E-688. (Annotated)

3. Grants in Aid of Railroads.

7. Withdrawal from settlement—Lands previously claimed.—A railroad company which, prior to the enactment of the Act of June 25, 1910 (36 St. L. 847; 8 Fed. St. Ann. 2d ed. 657), providing for the withdrawal of certain lands from settlement, filed a list of indemnity lands claimed by it, is entitled to the lands so claimed despite a subsequent order withdrawing them from settlement. *Central Pac. R. Co. v. Lane* (D. C.) 1918C-1002. (Annotated)

4. Transfer of Rights.

8. Unlocated certificate.—An unlocated certificate for public lands may be assigned. *Hennessy v. Blair* (Tex.) 1918C-474.

9. Relinquishment of timber lands.—Under Act Cong. June 4, 1897, c. 2, 30 Stat. 36 (9 Fed. St. Ann. [2d ed.] 588) providing that in cases in which a tract of land covered by

an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation the settler or owner may relinquish the tract to the government and select in lieu thereof a tract of vacant land open to settlement, title to the base lands passes to the United States on the acceptance of the deed and the approval of the selection by the general land office, and, though deeds have been executed and filed, title does not pass until the transfer is accepted by that office. *State v. Hyde (Ore.) 1918E-688.* (Annotated)

5. Cancellation of Deeds.

a. In General.

10. What constitutes fraud.—Where, by means of applications in the names of dummy applicants and by false affidavits, thousands of acres of school lands were acquired from the state by nonresidents, contrary to the policy of the state to sell only to residents who purchase for their own benefit and in quantities not exceeding 320 acres to each person, there is such fraud as justified the cancellation of the deeds, though the state received the price at which the lands were held for sale, especially as the market value of the lands subsequently increased and the state land board raised the selling price; it being probable that, if sales had been made only to qualified purchasers in amounts not exceeding 320 acres to each purchaser, the bulk of the lands would have remained available for sale at the higher prices. *State v. Hyde (Ore.) 1918E-688.*

11. Land relinquished to government.—Act Cong. March 3, 1905, c. 1495, 33 Stat. 1264, repealing Act Cong. June 4, 1897, c. 2, 30 Stat. 36 (9 Fed. St. Ann. [2d ed.] 588) providing in cases where a tract of land covered by an imperfect bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner may relinquish it to the government and select in lieu thereof a tract of vacant public land open to settlement, but providing that the selections heretofore made in lieu of lands relinquished may be perfected as though the act had not been passed, does not, where title to base land relinquished in lieu of other lands to be selected from the public domain was acquired from the state by fraud, vest such title in the United States, so as to preclude an attack on the title to base land by the state, where the United States has not accepted the conveyance of the base lands. *State v. Hyde (Ore.) 1918E-688.* (Annotated)

b. Actions.

(1) Jurisdiction.

12. Effect of uncompleted transfer to United States.—Where deeds to school lands within a national forest reserve were obtained by fraud and the grantees or their successors executed deeds to the United States and filed them as the basis of lieu

land selections, but the deeds were not accepted by the land office, the pendency in such office of proceedings on charges against the validity of the selections of lieu lands does not prevent an action to cancel the deeds from the state, as, the United States having acquired no interest in the lands, the general land office has no control over them; its jurisdiction being confined to the public domain. *State v. Hyde (Ore.) 1918E-688.*

(2) Laches.

13. While it is a suspicious circumstance that 146 applications should be made within a few months to purchase state lands in a forest reserve and that deeds should issue shortly afterwards to a handful of nonresidents transferring many thousands of acres of such lands, where these matters apparently passed unnoticed by the state officials, laches is not imputable to the state in its failure to act for the cancellation of the deeds for fraud in the inception of the fraud, as notice must be more than would excite the suspicion of a cautious and wary person. *State v. Hyde (Ore.) 1918E-688.*

14. A delay of fifteen years from 1898 to 1913 in bringing suit to set aside deeds to school lands based on fraudulent applications by dummy applicants is held not to be such laches as barred the suit, where the fraud was not discovered until 1905 and the facts were not fully known until 1908, at which time the position of innocent defendants had become fixed, and the condition and value of the lands did not change appreciably and where the marshaling of the facts involved a vast amount of investigation and painstaking labor and the charges reflected on the integrity of a number of citizens of the state necessitating careful investigation before making such charges and taking action, especially where in spite of the delay the evidence of the fraud was clear and the fraud could not have been disproved. *State v. Hyde (Ore.) 1918E-688.*

(3) Parties.

15. United States.—Where deeds executed by grantees of school lands or their successors to the United States and filed as a basis for lieu land selections have never been accepted by the United States and it has never been determined by the general land office that the grantors have title or that the deeds are effectual to pass title, the United States has no interest in the lands and is not a necessary party to a suit by the state to cancel the deeds from the state for fraud. *State v. Hyde (Ore.) 1918E-688.*

16. Where school lands within a national forest reserve were purchased from the state in the name of dummy applicants, who immediately assigned their contracts to the party for whose benefit the applications were made in violation of the statute contemplating that the purchase shall be for the benefit of the applicant, and after the execution of deeds the grantees or their successors executed deeds to the United States

as a basis for lieu land selections, and such deeds were accepted by the proper officers of the United States, the deeds from the state cannot be canceled because of the fraud inducing their execution without the presence of the United States as a party, though the United States has co-operated with the state in marshaling the evidence of the fraud and instituted adverse proceedings against the corresponding selections on the public domain. *State v. Hyde (Ore.) 1918E-690.*

17. That the United States cannot be sued without its consent does not authorize the court to pass a decree canceling the deeds which it cannot enforce. *State v. Hyde (Ore.) 1918E-690.*

18. Purchasers of lien lands who have no title.—In a suit to cancel deeds to school lands within a forest reserve which have been subsequently offered to the United States as a basis for lieu land selections, but which have not been accepted by the United States, it is immaterial whether purchasers of the land selected in lieu thereof were bona fide purchasers, as their title to the selected lands is dependent on the title of the United States to the base lands and the United States never acquired title to the base lands. *State v. Hyde (Ore.) 1918E-688.*

(4) Evidence.

19. Sufficiency of evidence of fraud.—In a suit to cancel deeds to school lands purchased from the state on applications of dummy applicants, the evidence is held to show that a party who financed the purchases and took deeds to secure money advanced by him was a party to the conspiracy and was not an innocent purchaser. *State v. Hyde (Ore.) 1918E-688.*

19 a. Where the grantors of the United States have conveyed the selected lands and have executed to the purchasers powers of attorney authorizing the selection in the names of the grantors of lieu lands and the sale of the selected lands, and the powers of attorney have been exercised and land selected and conveyed to parties who were in possession, such parties, in protection of their titles to the selected lands, are entitled to claim that the United States was the owner of the base lands, and as a corollary to that claim to urge that the controversy could not be determined in the absence of the United States as a party. *State v. Hyde (Ore.) 1918E-688.*

20. In a suit to cancel deeds to school lands, the evidence is held to be sufficient to establish a conspiracy to obtain such lands in fraud of the public policy of the state by procuring a large number of applications from dummy applicants, who immediately assigned their contracts, and to show that a defendant who thereby acquired deeds to thousands of acres of land was a party to the conspiracy and the author of it. *State v. Hyde (Ore.) 1918E-688.*

(5) Relief Granted.

21. Accounting for profits.—The state, suing to cancel deeds to school lands relin-

quished to the United States as the basis of lieu land selections for fraud in procuring such deeds, cannot recover the lands and also have an accounting from the grantees for money secured by them through the attempted exchange of the lands. *State v. Hyde (Ore.) 1918E-688.*

PUBLIC LIBRARY.

As necessary municipal building for which land may be condemned, see *EMINENT DOMAIN*, 5.

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Conditional signing by surety on bond of public officer as defense to action on bond, see *SURETYSHIP*, 4-7.

Withdrawal of candidacy, see *ELECTIONS*, 11-13.

1. In General.

1. Members of committee as public officers.—Members of a city council, appointed a joint special committee to expend the appropriation for and to arrange for a Fourth of July celebration, were in no sense "public officers," so as to be exempt from liability for personal injury resulting from the setting off of fireworks, as "public officers" are those officers who are required by law to be elected or appointed, and whose duties are prescribed by law, such as municipal officers acting, not by virtue of authority conferred by ordinance or resolution, but by resolution of acts of the legislature *Sroka v. Halliday (R. I.) 1918D-961.* (Annotated)

2. Qualifications and Eligibility.

2. Statute limiting consecutive service.—A statutory provision (Acts 1915, p. 52), amending an act (Acts 1911, p. 289) creating a commission form of municipal government and regulating the selection and election of commissioners, . . . "which pro- no person shall be eligible to the office of president or member of the board of commissioners who shall, either by election or appointment, have held the office of president or member of the board of commissioners for three consecutive years within the four years immediately preceding the date of the election, is not unconstitutional, as exceeding the power of the legislature to fix the qualifications for the office of city commis-

sioner; the matter of being a candidate being merely a privilege and not a right. *State v. Teasley (Ala.) 1918E-347.*

(Annotated)

3. A statutory provision amending an act creating a commission form of municipal government and regulating the selection and election of commissioners, which provides that no person shall be eligible to the office of city commissioner who shall have held such office for three consecutive years within the four years preceding the date of election, does not violate Const. § 22, nor Const. U. S. art 1, § 10, relating to ex post facto laws; an "ex post facto law" being one which imposes a punishment for an act which was not punishable when it was committed, and imposes additional punishment, or changes the rules of evidence by which less or different testimony is sufficient to convict. *State v. Teasley (Ala.) 1918E-347.*

(Annotated)

4. "An act to amend an act to create a commission form of municipal government, . . . and to regulate the selection and election of commissioner, . . ." which provides that no person shall be eligible to the office of commissioner who has held such office for three consecutive years within the four years immediately preceding the election, does not violate Const. § 45, requiring that each law shall contain one subject, which shall be clearly expressed in its title. *State v. Teasley (Ala.) 1918E-347.*

(Annotated)

5. A statutory provision amending an act to create a commission form of municipal government and to regulate the selection and election of commissioners, which provides that no person shall be eligible to the office of commissioners who shall have held such office for three consecutive years within the four years immediately preceding the date of the election, is not invalid, as being retroactive, when applied to a candidate for office who had held the office of city commissioner for two and one-half years before the statute was passed. *State v. Teasley (Ala.) 1918E-347.*

(Annotated)

6. Statute prescribing political belief as "recommendatory" only.—Under Pub. Loc. Laws 1913, c. 441, § 7, providing that "one each of the two members of the several township highway commissions to be elected under this act shall, so far as feasible and practicable, come from each of the two leading political parties of such township," the three relators who received a majority vote and duly qualified as township highway commissioners were entitled to their offices, although all were Republicans; the statute being merely recommendatory to the voters. *State v. Sanders (N. D.) 1918-1033.*

(Annotated)

7. The feasibility and practicability of electing persons of different political parties is a matter for the voters, and their judgment is final and not reviewable by the courts. *State v. Sanders (N. C.) 1918D-1033.*

(Annotated)

3. Compensation and Expenses.

a. In General.

8. Allowance of mileage.—A county commissioner in attending board meetings is entitled to compute mileage for the distance "necessarily traveled" by the usual traveled route from the place of residence to the county seat. *Marshall County v. Rokke (Minn.) 1918D-932.*

(Annotated)

b. Extra Duties Imposed by Statute.

9. A public officer is bound to perform the duties of his office for the compensation fixed by law. This is true as to additional duties imposed upon the office by the legislature after he enters upon his term, provided such duties are germane to the office. *Board of County Com'rs v. Bruce (Okla.) 1918E-1060.*

(Annotated)

10. The salary of county clerks being definitely fixed by chapter 19, sec. 1, Sess. Laws 1905, and the duties imposed upon the office of county clerk under chapter 19, Sess. Laws 1909, being additional, the fees authorized to be retained under section 9, art. 4, of said act could not be retained by the clerks as additional compensation, for to do so would violate section 19, art. 23, of the constitution, prohibiting the increase of the emoluments of an office during its term. *Board of County Com'rs v. Bruce (Okla.) 1918E-1060.*

(Annotated)

11. Chapter 19, sec. 1, Sess. Laws 1905, put in force in the state of Oklahoma by section 18 of the schedule of the constitution, fixed the salary of the county clerks of the various counties of the state. The authority conferred upon county clerks to issue hunting licenses, under the act of the legislature approved March 8, 1909 (chapter 19, Sess. Laws 1909), are additional duties conferred upon the office of county clerk, and are germane to such office; and the fees authorized to be retained by clerks for issuing hunting licenses under section 9, art. 4, of such act should be accounted for by them, and they are not entitled to retain the same as additional compensation for such services. *Board of County Com'rs v. Bruce (Okla.) 1918E-1060.*

(Annotated)

c. Validity of Agreement to Share Fees.

12. An agreement by one candidate to withdraw his candidacy just before election, when too late to fill the vacancy, in consideration of his opponent agreeing to appoint him deputy, and to divide his fees, a fund to secure performance of the agreement being deposited, is void as against public policy, and the parties are equally at fault. *Martin v. Francis (Ky.) 1918E-289.*

(Annotated)

4. Accounting.

13. Who may enforce.—Where the county board fixes the salaries of county officers and the statute requires such officers to pay the county treasurer all fees received by them above the amounts so fixed, the officers are

to account with the county board, and legal title is in the county which may maintain suit, the distribution of separate funds being a matter of accounting. *Lake County v. Westerfield* (Ill.) 1918E-102.

14. Liability for interest on funds.—Under Const. art. 10, § 10, providing that the county board shall fix the compensation of all county officers with the amount of necessary expenses, and all fees or allowances received in excess of this compensation shall be paid into the county treasury, and Fees and Salaries Act (Hurd's Rev. St. 1913, c. 53) § 52, containing similar provisions, and Rev. St. 1874, c. 36, § 4, providing that the county treasurer shall have custody of funds authorized by law to be paid to him, and various sections of the Revenue Act (Hurd's Rev. St. 1913, c. 120), prescribing the duties of the county treasurer, as ex officio collector, and creating an absolute liability of county treasurers for money in their hands so as to make them insurers of the safety of such money, a county treasurer is not a bailee in the sense of having possession of money for temporary purposes with a qualified property in it, nor a debtor beyond the sense that he owes an obligation to pay over the money, but is a mere custodian of public funds, for the safety of which he gives his official bond, and although he is not required to make the money in his hands earn interest, if the funds do earn interest, he is not entitled to retain it, but must account for it as a prerequisite or emolument acquired by his official position. *Lake County v. Westerfield* (Ill.) 1918E-102. (Annotated)

5. Official Bonds.

15. Successive Bonds.—Where an officer gives two or more successive bonds, liability for maladministration thereunder falls only upon the sureties on the bond or bonds in force when the default occurred. A renewal bond does not cover any defaults occurring before its execution, unless by its terms the liability is so extended. *Raleigh County Ct. v. Cottle* (W. Va.) 1918D-510.

16. Acts outside official duty.—Under Rev. Codes, § 5682, providing that a surety cannot be held beyond the express terms of his contract, the sureties on a county assessor's bond conditioned that he would "faithfully perform all official duties now required of him by law, and . . . all . . . duties . . . required by any law to be enacted subsequent to the execution of this bond," are not liable for moneys improperly paid and delivered to the assessor as compensation for the collection by him of certain city taxes, where the collection of such taxes is not imposed on him by law, but reposed elsewhere under sections 2684, 3356, 3357. *Butte v. Bennetts* (Mont.) 1918C-1019.

(Annotated)

PUBLIC POLICY.

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Submission of question of law to jury as error, see APPEAL AND ERROR, 85, 86.

Weight of testimony of party, see TRIAL, 8, 9.

QUIETING TITLE.

Injunction against execution sale which would cloud title, see INJUNCTIONS, 5-7.

1. **Variance in description.**—A decree quieting title will not be disturbed because of a slight variance in the description therein and in the description of the instruments on which plaintiff relied, especially where the record does not show that the party complaining was prejudiced thereby. *Wolfenberger v. Hubbard* (Ind.) 1918C-81.

QUO WARRANTO.

1. **By whom brought.**—Informations in the nature of a quo warranto under our statute are of three classes: (1) By the attorney general without leave of the court at his own discretion; (2) in the name of the attorney general by leave of the court at the instance of any person desiring to prosecute; (3) under section 4 of the act where the question is of usurpation or intrusion into a municipal office or franchise, by a citizen who believes himself lawfully entitled to such office or franchise. *Bonyng v. Frank* (N. J.) 1918D-211.

2. **Joinder of relators.**—In quo warranto against a railroad, though public interests are involved, the mere fact that a private corporation and private citizens joined as relators are interested in the suit or have employed counsel to assist in the prosecution thereof is no defense. *People v. Toledo*, etc. R. Co. (Ill.) 1918D-224. (Annotated)

3. **Joinder of parties defendant.**—An information in the nature of quo warranto will lie jointly against several members of a board of trustees of a cemetery company. *Bonyng v. Frank* (N. J.) 1918D-211. (Annotated)

4. **An information in the nature of quo warranto to test by what right a railroad held a right of way which had been transferred to it by another railroad after expiration of the time when the original holder could have built upon such right of way is not defective in joining the original holder and the transferee of the right of way.** *People v. Toledo*, etc. R. Co. (Ill.) 1918D-224. (Annotated)

5. **Determination of title to office.**—Even in the case of information in the nature of a quo warranto as to a municipal office or franchise, the title of the relator could not be put in issue prior to 1895. Under the act of that year (Comp. St. p. 4214) it is not incumbent on the relator to put his own title in issue; but the defendant is permitted to do so, and the court will then determine which claimant if either is entitled to the office. *Manahan v. Watts*, 64 N. J. L. 465, explained. *Bonyng v. Frank* (N. J.) 1918D-211.

6. **In case of an information in the nature of quo warranto under section 1 of the act in the name of the attorney general by leave of the court, any person desiring to prosecute may be relator. He need not himself claim the office; but leave of the court will not be granted, unless the relator is acting in good faith in vindication of his own rights or those of the public or a portion of the public.** *Bonyng v. Frank* (N. J.) 1918D-211.

7. **Judgment on demurrer.**—A demurrer to an information in the nature of a quo warranto admits the charge of the information that the demurrant intrudes into and unlawfully holds and exercises the office, but where the information itself shows that a demurrant is entitled to the office, the averments are inconsistent and the demurrant is entitled to judgment. *Bonyng v. Frank* (N. J.) 1918D-211.

8. **Where an information in the nature of quo warranto shows that a cemetery company had fifteen trustees; that the terms of five only had expired and the terms of ten had not expired; that nevertheless an attempt had been made to elect nine as successors of the fifteen, a judgment of ouster follows a demurrer to the information as to any defendant who is brought into court, and not shown by the information itself to be entitled to the office.** *Bonyng v. Frank* (N. J.) 1918D-211.

9. **Extent of relief granted.**—In quo warranto to test by what right a railroad held a right of way which it had forfeited by failure to operate its road within ten years of the grant, the judgment in favor of the state should merely oust the defendant railroad. *People v. Toledo*, etc. R. Co. (Ill.) 1918D-224.

RACE.

Reference by prosecuting attorney to race of accused, see ARGUMENT AND CONDUCT OF COUNSEL, 2.

Statute penalizing denial of accommodation in public place on account of race, see CIVIL RIGHTS, 1, 2.

RAILROAD COMMISSIONS.

Power of public service commission to compel building of side track, see RAILROADS, 4.

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RAILROAD RELIEF ASSOCIATION.

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RAILROADS.

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Special damage to railroad from sale of intoxicants as entitling it to sue for injunction to test validity of license, see INTOXICATING LIQUORS, 1.

Specific performance of contract to maintain depot, see SPECIFIC PERFORMANCE, 5-13.

Taxation, see TAXATION, 7-13.

1. Charter and Corporate Bonds.

1. Forfeiture of charter.—Hurd's Rev. St. 1915-1916, c. 114, § 26, providing for forfeiture of a railroad charter if the road is not in operation within ten years after the grant, cannot be defeated by a transfer of the right of way by the first holder before expiration of the ten-year period to another railroad. *People v. Toledo, etc. R. Co. (Ill.)* 1918D-224.

2. It is contrary to public policy to permit a railway company to control a located right of way, without completing its railroad, for a longer time than the statutory period. *People v. Toledo, etc. R. Co. (Ill.)* 1918D-224.

3. Defeat of forfeiture by transfer.—Hurd's Rev. St. 1915-1916, c. 114, § 19, cl. 2, empowering railroad corporations to take and hold voluntary grants of real estate and to convey the same when no longer required for the uses of the railroad, does not authorize a railroad which has failed to construct its line and operate it within ten years from the grant to transfer its right of way in whole or in material part and thereby defeat Hurd's Rev. St. 1915-1916, c. 114, § 26, providing for forfeiture after ten years. *People v. Toledo, etc. R. Co. (Ill.)* 1918D-224.

2. Railroad Commissions.

4. Power to compel building of sidetrack.—The state under its police power may empower a public service commission to require a railroad company to provide such sidetrack facilities to industries adjacent to its tracks as shall be found to be necessary and reasonable under all the circumstances, and may apportion the necessary expense therefor between the company and the industry in such manner as shall be found to be reasonable. *Ochs v. Chicago, etc. R. Co. (Minn.)* 1918E-337. (Annotated)

3. Rights, Powers and Duties.

a. Crossings.

5. Width of street at crossing.—At the crossing of its track by a street fifty feet wide used by from seventy-five to ninety per cent of the pedestrians in a town of from 1,000 to 1,500 inhabitants, the railway is required to leave more than the sixteen or twenty foot crossing used for teams, and to construct a footway across its track from the end of the sidewalk running beside the street to the end of the sidewalk on the opposite side. *Chicago, etc. R. Co. v. Redding (Ark.)* 1918D-183. (Annotated)

b. Use of Bridge of Another Company.

6. A railroad authorized by its articles of incorporation to operate between Spokane and Portland is entitled to use of a bridge across the Willamette river at Portland, to reach the industrial district of the city on the other side of the river from the road's passenger terminals, under the ordinance of the Port of Portland authorizing the bridge, which provided that it should be open to the use of any railroad other than the one which built it on payment of a reasonable compensation. *Oregon-Washington R. etc. Co. v. Spokane, etc. R. Co. (Ore.)* 1918C-991.

7. A railroad having its passenger terminals on the west bank of a river and desirous to use a bridge across such river to reach an industrial district on the east bank, is a railroad company within the common user clause of the ordinance of the city authorizing another railroad to build the bridge, although the bridge and its approaches would not be used by the road's passenger trains or for the carriage of mail and express matter, but only to switch freight traffic, since payment to the company which built the bridge of adequate compensation was a condition under the ordinance to the exercise of the right of common user, so that the proceeding for common user was analogous to a condemnation proceeding, while in such a proceeding a limited easement may be condemned. *Oregon-Washington R. etc. Co. v. Spokane, etc. R. Co. (Ore.)* 1918C-991.

8. Compensation.—Where a railroad built a bridge under an ordinance providing that it might be used by other roads on payment of compensation, and, after a second road began to use it with the first, a third road desired its use for freight traffic only, such third road is not chargeable with a third of the interest on the investment and a third of the depreciation charge, but is chargeable with a substantial part of such charges, such as twenty per cent of the interest on the road's investment in the bridge and its approaches, eliminating so much of the investment as was chargeable to the upper deck of the bridge, used for vehicle and foot traffic only, also such proportion of the first road's expenses for maintenance and operation of the railway portion of the bridge and taxes thereon as the third road

traffic bears to the entire traffic on the bridge, and also a like proportion on an annual depreciation charge; interest being figured at the legal rate. *Oregon-Washington R. etc. Co. v. Spokane, etc. R. Co. (Ore.)* 1918C-991.

9. Adequacy of compensation.—A railroad owning a bridge which it is required to permit other railroads to use is entitled to a fair share of the charge for operation and maintenance of the bridge and of the interest on the investment, regardless of fluctuations of railway traffic, so that the fact that the award of arbitrators fixed an adequate charge for each car hauled across the bridge does not show that the compensation awarded by them was adequate. *Oregon-Washington R. etc. Co. v. Spokane, etc. R. Co. (Ore.)* 1918C-991.

10. Evidence.—On proceedings to determine the compensation to be paid by one railroad for the use of a bridge constructed by another under a city ordinance requiring it to permit the user on payment of compensation, contracts fixing the terms under which different railway companies used bridges of others which failed to show a uniform practice in that respect are immaterial. *Oregon-Washington R. etc. Co. v. Spokane, etc. R. Co. (Ore.)* 1918C-991.

11. In a suit to set aside an award of arbitrators of compensation to be paid by one railroad for the use of a bridge constructed by another, exhibits showing the number of cars switched by the owner of the bridge for the other railroad during certain periods, which included cars switched to a point across the river at which the using railroad had no terminal and covered the period when it was acquiring its main terminal across the river, and which did not include freight carried by the using railroad in less than carload lots and team freight which could not be switched, are of no value in showing the volume of the traffic of the using railroad across the bridge from which compensation for the use could be determined. *Oregon-Washington R. etc. Co. v. Spokane, etc. R. Co. (Ore.)* 1918C-991.

12. Provision in decree for modification.—In suit to set aside an award of arbitrators determining the compensation to which a railroad which built a bridge was entitled for its use by another road under a common user clause of the city ordinance authorizing the building, the decree setting aside the award and correcting its errors should give the road which built the bridge leave to apply for a modification of the compensation, in case a road not a party to the suit ceased to use it, and in case one or more additional railroads should secure the right to use it the other road should have a similar right to apply for modification. *Oregon-Washington R. etc. Co. v. Spokane, etc. R. Co. (Ore.)* 1918C-991.

13. Presumptions in favor of award.—The presumptions are in favor of an award by the railroad commission sitting as a board of arbitration to determine what compensation a railroad which built a bridge is enti-

tled to for the common use of such bridge by another road under a common user clause of the city authorizing the building of the bridge. *Oregon-Washington R. etc. Co. v. Spokane, etc. R. Co. (Ore.)* 1918C-991.

4. Liability for Injuries to Persons.

a. Persons at Crossing.

(1) Warning of Approach of Trains.

14. Where it is shown that a railroad company had intersected a roadway long used by the public, and constructed therein a cut without providing warning signals of any sort, its acts in so doing may amount to negligence, even though the roadway is not a legally established highway or street. *Chambers v. Minneapolis, etc. R. Co. (N. D.)* 1918C-954.

15. Excessive speed and failure to give signals.—Engine men in charge of a locomotive attached to a passenger train, who cut off the steam and apply the air one-quarter of a mile before reaching a street crossing in a small city, and who suppose that an electric warning bell stationed at the crossing is ringing, are not guilty of wantonness, although they fail to ring the engine bell or sound the whistle for the crossing, and although they go through the city at the rate of forty-five miles per hour. *Jacobs v. Atchison, etc. R. Co. (Kan.)* 1918D-384.

(2) Contributory Negligence.

16. Care required of chauffeur.—The fact that the chauffeur at the time of his death is carrying a passenger for hire, whereby he is charged with the very highest degree of care, does not charge him with such degree of care in going on the track as between himself and the defendant railway in such action for his death, since the duty to exercise the highest care obtains only as between the chauffeur and his passenger, and does not alter the standard of care owing by the chauffeur as between himself and defendant which is simply that of exercising reasonable care for his own safety. *Southern R. Co. v. Vaughan (Va.)* 1918D-842.

17. Failure to see headlight.—In an action to recover for the death of an automobile driver struck on a highway crossing by defendant's train after dark, the fact that defendant's train was equipped with a powerful headlight, which brightly illuminated everything upon which it played, is not sufficient to convict decedent of contributory negligence in going upon the track, where the train's approach to the track was through a deep cut and around a curve which would confine the light to the walls of the cut until the train emerged close to decedent. *Southern R. Co. v. Vaughan (Va.)* 1918D-842.

18. Automatic bell not ringing.—It is such negligence as will prevent a recovery for injuries sustained for a driver of an automobile to attempt to cross a railroad track at a grade crossing without looking or listening for the approach of a train, although an

electric warning bell is maintained at the crossing and the bell is not ringing. *Jacobs v. Atchison, etc. R. Co. (Kan.) 1918D-384.* (Annotated)

(3) Actions.

19. Instruction as to maintenance of crossing.—An instruction that a railway was bound to use reasonable care in the construction and maintenance of its cut in a reasonably safe condition for travel upon the road which it crosses, and that otherwise it is liable for injury sustained thereby, in view of the entire instruction, is not misleading. *Chambers v. Minneapolis etc. R. Co. (N. D.) 1918C-954.*

20. Question for jury—View obscured.—The defendant railroad company, in constructing its railroad, intersected a trail or roadway which had long been used by the public, constructed therein a deep cut, and failed to guard the same. It is held that the question of negligence was one of fact for the jury. *Chambers v. Minneapolis, etc. R. Co. (N. D.) 1918C-954.*

b. Injury from Fire.

21. Applicability of statute.—Laws 1912, c. 151, making a railroad corporation liable to every person whose property is injured by fires communicated by locomotive engine, and giving the corporation an insurable interest in the property along the route, is limited to liability for property destroyed, and does not authorize a recovery for personal injuries or death resulting from a fire started by engine without proof of negligence. *Yazoo, etc. R. Co. v. Washington (Miss.) 1918E-813.* (Annotated)

22. Evidence.—In an action against a railroad company for the death of plaintiff's mother and the burning of her house in which she was at the time, evidence is held not to show that the railroad negligently operated the engine which caused the fire at a speed of more than six miles per hour in an incorporated town, contrary to Code 1906, § 4043. *Yazoo, etc. R. Co. v. Washington (Miss.) 1918E-813.*

RAPE.

1. Sufficiency of indictment.—To aver that a man forcibly and against the will of a female did carnally know her, is the same as to aver that he carnally knew her forcibly and against her will. There is no statute or rule of law prescribing the order in which these collocations of words shall precede and follow one another in an indictment or allegation. *State v. Heyer (N. J.) 1918D-284.*

2. In an indictment or allegation for rape it is not necessary to charge that the offense was committed forcibly and against the will of the woman. It is sufficient if it charges that the defendant feloniously did ravish and carnally know her. State v. Heyer (N. J.) 1918D-284.

3. An allegation for rape (indictment being waived) examined and held, construing its several phrases together and reading them in connection with one another, that, in fact, it charges the defendant with carnal knowledge of a certain woman forcibly and against her will. State v. Heyer (N. J.) 1918D-284.

RATES.

See **BENEFICIAL ASSOCIATIONS**, 6-11.
Regulation, see **CARRIERS**, 1-6; **INSURANCE**, 9-15.

REAL ESTATE BROKERS.

See **BROKERS**, 1-12.

REAL PARTY IN INTEREST.

In action against carriers, see **CARRIERS OF GOODS**, 15.

RECALL.

Validity of statute providing for recall of city commissioner, see **MUNICIPAL CORPORATIONS**, 7.

RECEIVERS.

1. Liability for tort prior to appointment.—The receiver of a railroad was not liable for damages from the road's tort committed before his appointment, despite his being given authority by the appointing order of the court to defend suits against the road. *Bush v. Stephens (Ark.) 1918E-259.* (Annotated)

RECEIVING PROPERTY.

Receiving property of soldier, see **ARMY AND NAVY**, 8, 9.

RECIPROCAL.

Demurrage, see **CARRIERS**, 7; **STATUTES**, 8.

RECITALS.

In deeds, see **DEEDS**, 13, 14.
Sufficiency of recital in title of statute, see **STATUTES**, 7.

RECORDING ACTS.

Effect of failure to record chattel mortgage, see **CHATTEL MORTGAGES**, 1.

Failure to record deed before suit commenced as subjecting property to lien of lis pendens, see *LIS PENDENS*, 6, 7.

Necessity for registration of assignment of proceeds of building contract, see *ASSIGNMENTS*, 8, 9.

1. Instruments entitled to record—Option contract.—An option contract for the purchase of land is a contract for an interest in land, and, when properly acknowledged, is recordable, and, when recorded, gives notice to a subsequent purchaser of the vendor. *Fields v. Vizard Invest. Co. (Ky.)* 1918D-336.

2. Torrens act—Validity.—Laws 1903, p. 311 (*Torrens System*), concerning registration of land titles, sections 83, 84, and 85 of which provide for payment upon registration of each title of a percentage to the assessed value of the property registered for the purpose of providing a fund out of which shall be paid damages recovered in an action authorized for omission, mistake, etc., of the registrar, examiner, or clerk of court, etc., is not unconstitutional on the ground that it engages the state in the business of insuring titles. *White v. Ainsworth (Colo.)* 1918E-179. (Annotated)

3. Laws 1903, p. 311, concerning registration of titles to land, which provides for personal service on residents and service by publication on nonresidents and unknown claimants, and allows time for filing answers, trial, etc., is not unconstitutional on the ground that it constitutes the taking of property without just compensation. *White v. Ainsworth (Colo.)* 1918E-179. (Annotated)

4. Laws 1903, p. 311, concerning registration of title to land, section 49 of which provides for reference to the court of all disputed questions, is not violative of Const. art. 3, vesting the powers of government in three distinct departments, on the ground that it confers judicial powers on the registrar, since, although he may exercise some judgment, the registration is the act of the court. *White v. Ainsworth (Colo.)* 1918E-179. (Annotated)

5. Laws 1903, p. 311, concerning the registration of titles to land, is not violative of Constr. art. 2, § 25, or the fourteenth amendment to the Federal Constitution, on the ground that it takes property without due process of law, because section 28 only allows 90 days in which judgment may be vacated by a person not actually served with notice, since the time within which a judgment may be vacated and a person allowed to plead is a matter of procedure which the state, through its lawmaking body, has a right to fix as it sees fit, and the constitutional provision pertaining to due process of law is applicable to rights, not remedies. *White v. Ainsworth (Colo.)* 1918E-179. (Annotated)

6. Jurisdiction over property of minors.—By its express provisions Laws 1903, p. 311, concerning registration of title to land, was intended and does allow titles to be quieted where the alleged interests of minors is in-

volved. *White v. Ainsworth (Colo.)* 1918E-179.

7. Summons.—Where plaintiffs' ancestor died before service of notice by publication upon her by name in a suit under Laws 1903, p. 311, to register title to land, the summons served upon plaintiffs under the designation of "all other persons or parties unknown," etc., constitutes due process of law, and is sufficient to give the court jurisdiction under the registration act. *White v. Ainsworth (Colo.)* 1918E-179. (Annotated)

8. Conclusiveness of finding.—In an action to cancel deeds and a decree confirming title and ordering registration of land under Laws 1903, p. 311, the question upon conflicting evidence whether the first grantee under the registration act was an innocent purchaser for value relying upon a registered title is for the trial court, and its finding cannot be disturbed on appeal. *White v. Ainsworth (Colo.)* 1918E-179.

RECORDS.

Certification of transcript of evidence taken before referee, see *REFEREES*, 1, 2.

Consideration of record in another case by appellate court, see *APPEAL AND ERROR*, 40.

On appeal, see *APPEAL AND ERROR*, 16-23.

REFEREES.

Authority of master in action to determine rights of infant in option contract, see *INFANTS*, 6.

1. Termination of authority of referee.—A referee, under section 24, c. 57, Sess. Laws 1907, may certify to the transcribed notes of the stenographer, so that the transcript of evidence may become a part of the record without any bill of exceptions; but he has no power to make up a transcript of the evidence and certify to the same after he has filed his report, because he is then *functus officio*. *Baca v. Unknown Heirs of Jacinto Palaez (N. M.)* 1918E-612. (Annotated)

2. When a referee has performed the duty imposed by the order of his appointment he is *functus officio*, and his acts are no more than the acts of a private individual. When he has filed his report and it has become a record of the court, his power over it is at an end and his relation to the case has ceased. *Baca v. Unknown Heirs of Jacinto Palaez (N. M.)* 1918C-612. (Annotated)

REFERENDUM.

See *INITIATIVE AND REFERENDUM*.

REFORMATION OF INSTRUMENTS.

See *RESCISSION, CANCELLATION AND REFORMATION*.

REFRESHING MEMORY.

See WITNESSES, 9.

REGULATION OF RATES.

Of beneficial societies, see **BENEFICIAL ASSOCIATIONS**, 10, 11.

Of carriers, see **CARRIERS**, 1-5.

Validity of statute creating insurance board and providing for control of rates, see **INSURANCE**, 8-14.

REHEARING.

Rehearing in appellate court, see **APPEAL AND ERROR**, 125, 126.

RELATIONSHIP.

Services between relations, see **PARENT AND CHILD**, 3.

RELATORS.

Joinder in mandamus, see **MANDAMUS**, 3.

Joinder in quo warranto, see **QUO WARRANTO**, 2.

RELEASE AND DISCHARGE.

See **BILLS AND NOTES**.

1. Effect of seal.—A seal on a release imports a consideration, and protects the instrument from attack for lack of consideration. *Dwy v. Connecticut Co. (Conn.)* 1918D-270.

2. Release of joint tortfeasor.—A release of one joint tortfeasor releases all, on the theory that the injured person has but a single claim and one cause of action, and can obtain but one satisfaction of the claim. *Ridgeway v. Sayre Electric Co. (Pa.)* 1918D-1.

3. An unqualified release or discharge of one or more of several joint tortfeasors given for a consideration is a release of all, and, as this rule rests on the fact that the releasor is entitled to only one satisfaction, and that an unqualified release or discharge implies the receipt of such satisfaction, the release need not be a technical release under seal; it being the acceptance of consideration in satisfaction for the injury received, and not the form in which it is evidenced, that is controlling. *Dwy v. Connecticut Co. (Conn.)* 1918D-270. (Annotated)

4. What constitutes release of tortfeasor.—In an action against an electric company for damages for the death of the plaintiff's husband, a lineman in the employ of a telephone company, killed by coming in contact with the electric company's defectively insulated wire strung on the same pole and close to the telephone company's line, the plaintiff's release of her rights against the

telephone company on the receipt of certain insurance money from an insurance fund payable independently of negligence, did not preclude her action of tort against the electric company, although the release in terms covered any claim which plaintiff might have against the telephone company. *Ridgeway v. Sayre Electric Co. (Pa.)* 1918D-1.

5. Reservation of right to sue other joint tortfeasors.—A formal release under seal of one of several joint tortfeasors which expressly reserved to the releasor the right to sue any other parties does not prevent the releasor from suing such other parties, as, though the seal furnished a conclusive presumption of full consideration, it furnished a presumption only of full consideration for the surrender or discharge which it by its terms made, and, having expressly negatived the receipt of full satisfaction by reserving the right of action against other parties, there is no presumption of full satisfaction for the wrong, and a sealed instrument, like any other instrument, must be construed according to its manifest intent. *Dwy v. Connecticut Co. (Conn.)* 1918D-270. (Annotated)

6. Covenant not to sue joint tortfeasor.—A covenant not to sue one of several joint tortfeasors does not operate as a release of the others from liability, and cannot be pleaded in bar of an action against them. *Dwy v. Connecticut Co. (Conn.)* 1918D-270. (Annotated)

7. Partial satisfaction.—Full satisfaction for an injury by one of several joint tortfeasors bars a further recovery, and a part satisfaction inures to the benefit of all and operates as a payment pro tanto. *Dwy v. Connecticut Co. (Conn.)* 1918D-270. (Annotated)

8. Parol evidence.—A release under seal cannot be modified by parol, or by a writing not under seal, or by evidence of an unexpressed intent. *Dwy v. Connecticut Co. (Conn.)* 1918D-270.

9. Misrepresentation in securing signature.—Although the insured kept for three weeks a draft to which was attached a release from liability, and then cashed it, it cannot be said that as a matter of law a representation, in securing his signature thereon, that it was a receipt, and not a release, was not a false, material representation. *Rocci v. Massachusetts Accident Co. (Mass.)* 1918C-529.

10. Return of consideration.—Where the insured received money, which he alleged was a part payment, and the insurer alleged was full payment, for a loss, he was not obliged, in suing on the policy, to make tender of the amount received, but it might be treated as a payment on account. *Rocci v. Massachusetts Accident Co. (Mass.)* 1918C-529.

RELEVANCY.

See **EVIDENCE**.

RELIEF DEPARTMENT.

See MASTER AND SERVANT, 27-34.

RELIGIOUS INSTITUTIONS.

Permitting graduating exercises to be held in church as violating constitutional inhibition against sectarian instruction in public schools, see SCHOOLS, 5, 6.

1. **Consolidation.**—Two or more church societies of the Methodist Episcopal Church of America may be joined together with a single pastor as a circuit or otherwise and have one quarterly conference, but that fact does not change the title of the church property or affect the financial interests of the separate societies. *Buhrnson v. Stoner* (Ill.) 1918D-1054. (Annotated)

2. **Sale of property.**—Under the law of the Methodist Episcopal Church of America providing for sale of church property abandoned or no longer used for the purposes originally designed, where a church was abandoned from about 1901 except for occasional uses of the church as a convenient place for some religious service and the church society was not recognized by the annual conference and performed none of the functions of a religious society, sale of the church property is not voidable by former trustees of the discontinued church society, although the proceeds, which by the church law were required to be turned over to the annual conference, were appropriated for another purpose. *Buhrnson v. Stoner* (Ill.) 1918D-1054. (Annotated)

3. **Judicial review of discipline of member.**—The religious rights of a church member as a communicant, even if she had appealed to the proper church authority and a decision adverse to her been given, are not enforceable in the civil courts. *Carter v. Papineau* (Mass.) 1918C-620. (Annotated)

4. For a minister to merely pass by without comment and not administer communion to a church member is not actionable as defamation of character. *Carter v. Papineau* (Mass.) 1918A-620. (Annotated)

5. Control of the use of the building for religious services being, under the laws of the church, in the minister, his temporary exclusion of a member therefrom, by having her told that she could not enter, in which she acquiesced, is not reviewable in a civil court. *Carter v. Papineau* (Mass.) 1918E-620. (Annotated)

6. **Liability for injurious utterances.**—Defendants, bishops of Roman Catholic Church, issued a pastoral letter to all the churches in their dioceses where Polish Catholics worshipped wherein the communicants were forbidden to read or subscribe to plaintiff's Polish newspaper on pain of sin and sacrilege. The letter did not require the breach of any contract with plaintiff or the withholding of any advertising patronage, and the only result of the refusal of communicants to obey its mandate was to lose their standing as members of the church. It is held that the

circulation of such letter gave rise to no cause of action in favor of plaintiff for loss sustained thereby, since the interdiction was within the scope of the church's discipline, in the enforcement of which any pecuniary loss to the plaintiff was *damnum absque injuria*. *Kuryer Pub. Co. v. Messmer* (Wis.) 1918C-778. (Annotated)

REMAINDERS AND REVERSIONS.

See DOWER; LIFE ESTATES; TRUSTS AND TRUSTEES; WILLS.

1. **Executory devises not favored.**—An estate is never allowed to inure by way of executory devise, if it can take effect as a remainder. *Pearson v. Easterling* (S. C.) 1918D-980.

2. **Vested or contingent—Gift over to "Heirs."**—Under a will devising to testator's daughter certain lands, to be free from her husband's debts or contracts "during the term of her natural life, and at her death that the lands descend to the heirs of her body to each an equal share, the children of any deceased's child representing the parent," each of the children of the daughter take a vested remainder, subject to be divested by his dying before the death of the life tenant, leaving a child, who, in such event, would take by substitution in place of the deceased parent; the limitation to such child of a deceased parent being an alternative remainder, and not an executory devise. *Pearson v. Easterling* (S. C.) 1918D-980. (Annotated)

3. **Acceleration.**—The principle of acceleration in the vesting of a remainder, because of the premature termination of the preceding life estate, rests upon testamentary intention, and is applied only when it promotes that intention. *Scatten v. Moore*, (Del.) 1918C-409.

REMAND.

By appellate court, see APPEAL AND ERROR, 104, 105.

By appellate court on rehearing, see APPEAL AND ERROR, 126.

Issues on trial after appeal, see APPEAL AND ERROR, 109.

REMITTITUR.

Where damages excessive, see DAMAGES, 5, 6.

REMOVAL OF CLOUD.

See QUIETING TITLE.

RENT.

See LANDLORD AND TENANT.

REOPENING CASE.

See TRIAL, 4.

REPAIRS.

Duty of life tenant as to repairs, see LIFE ESTATES, 19.

REPLY.

See PLEADING, 15.

REPRESENTATIONS.

Effect of representations by insurer, see INSURANCE, 21.

Misrepresentation as ground for rescission of contract for purchase of land, see VENDOR AND PURCHASER, 4-6.

Of insurance agents, see INSURANCE, 1-4.

Of life insurance company as part of contract, see LIFE INSURANCE, 4-6.

REPRESENTATIVE DEFENDANTS.

See PARTIES TO ACTIONS, 1, 2.

REPUTATION.

Proof of good reputation to corroborate witness, see WITNESSES, 16.

REQUESTS TO CHARGE.

See INSTRUCTIONS, 8, 9, 11-14.

RESCISSION, CANCELLATION AND REFORMATION.

Cancellation of fire insurance policy, see FIRE INSURANCE, 15-17.

Grounds for cancellation of automobile sales agency contract, see AGENCY, 1-3.

Liability of insurance agent to insurer for failure to cancel policy, see INSURANCE, 5-7.

Of contract for purchase of land, see VENDOR AND PURCHASER, 4-7.

Reformation of deed as against bona fide purchaser, see VENDOR AND PURCHASER, 18.

Rescission of contract by parties, see CONTRACTS, 21-22.

Rescission of contract of sale of goods by act of parties, see SALES, 2, 3, 7.

Revoking conditional assent to modification of lease, see LANDLORD AND TENANT, 5.

Right to revoke instrument creating trust, see TRUSTS AND TRUSTEES, 40.

Setting aside judicial sale, see JUDICIAL SALES, 4-6.

Suit to cancel grant of public lands by state, see PUBLIC LANDS, 10-21.

Suit to set aside deed on ground of undue influence deed creating trust, see TRUSTS AND TRUSTEES, 39.

Suit to set aside tax title, see TAXATION, 43.

1. **Grounds.**—Equity has jurisdiction to reform written instruments in but two well-defined cases: (1) Where there is a mutual mistake, that is, where there has been a meeting of minds, an agreement actually entered into, but the instrument in its written form does not express what was really intended by the parties thereto; and (2) where there has been a mistake of one party, accompanied by fraud or other inequitable conduct of the remaining parties. *Cleveland v. Bateman* (N. Mex.) 1918E-1011.

2. **Necessity of mutuality of mistake.**—To justify the reformation of a contract on the ground of mistake in drafting it, the alleged mistake must be proved by clear and satisfactory evidence, and must have been mutual and common to both parties. *Robertson v. Smith* (Mich.) 1918D-145.

3. **Mistake of law.**—A "mistake of law" happens when a party having full knowledge of the facts, comes to an erroneous conclusion as to their legal effect. It is a mistaken opinion or inference arising from an imperfect or incorrect exercise of the judgment upon facts as they really are. *Palmer v. Cully* (Okla.) 1918E-375.

4. "A mere mistake of law, not accompanied with other circumstances demanding equitable relief, constitutes no grounds for rescission, cancellation, or reformation of a deed to lands based upon such mistake"—following *Campbell v. Newman*, 51 Okla. 121, 151 Pac. 602. *Palmer v. Cully* (Okla.) 1918E-375.

5. **Effect of retention of premises by grantor.**—Evidence that the grantor remained in possession of the land, paid the taxes in his own name, and paid no rent, in the absence of fraud or undue influence, does not justify setting the deed aside. *Campbell v. Sigmon* (N. C.) 1918C-40.

6. **Reformation of void instrument.**—A court of equity will not reform a void instrument. Held, that the instrument which is sought to be reformed in this suit is not void. *Cleveland v. Bateman* (N. Mex.) 1918E-1011.

7. Where plaintiff for more than a month after learning that an automobile purchased by him was not in running order, as warranted by the vendor, makes no tender or offer to return the automobile, other than to express a willingness or a proposal to return it, he cannot recover as on a rescission of the contract. *Collins v. Skillings* (Mass.) 1918D-424. (Annotated)

8. **Conditions precedent.**—Where relief by way of reformation is incidental to the main purpose of a suit, it is not necessary to allege a demand to correct a mistake and a refusal thereof. *Cleveland v. Bateman* (N. Mex.) 1918E-1011.

9. **Sufficiency of complaint.**—(a) In a suit for reformation, the complaint must make it appear that complainant is pursuing his

remedy in good time after discovery of the injury; otherwise, the same is demurrable.

(b) Where a complaint is silent as to the time of discovery of a mistake, it must be taken to have been known to all parties interested from the time the instrument was made.

(c) An objection to the introduction of any evidence, made at the beginning of the trial, on the ground that the complaint does not state a cause of action, is in the nature of a demurrer ore tenus.

(d) A complaint and reply are considered together in determining a demurrer ore tenus directed to the complaint, where the reply alleges matters omitted by, and which should have been stated in the complaint, because the irregularity of pleading improper matters in the reply is waived by accepting it and in refusing to move to strike it out, or otherwise attacking it. *Cleveland v. Bateman* (N. M.) 1918E-1011.

10. The tenor of the instrument which the parties seek to have decreed by the court, in substitution of the agreement as reduced to writing, must appear upon the face of the complaint. *Cleveland v. Bateman* (N. Mex.) 1918E-1011.

11. Parties—Grantee in undelivered deed.—In a suit to cancel deeds to school lands for which the grantees or their successors have executed deeds to the United States as a basis for lieu land selections, an allegation that the United States has and still does refuse to accept the deeds of certain of the defendants imports that there had been no delivery of the deeds, and, though it appears that the deeds have been recorded, demurrers on the ground that the United States is a necessary party defendant are properly overruled, as a grantee under a deed acquires no rights in the absence of a delivery. *State v. Hyde* (Ore.) 1918E-688.

12. Evidence.—Evidence examined and held insufficient to prove mutual mistake or warrant the reformation of deeds on that ground. *Robertson v. Smith* (Mich.) 1918D-145.

RES GESTÆ.

Res gestæ evidence, see ADMISSIONS AND DECLARATIONS, 16-20.

RES IPSA LOQUITUR.

Application of doctrine in action against carrier of passengers, see CARRIERS OF PASSENGERS, 7, 8.

Application of doctrine in action against licensee for destruction of property by fire, see LICENSE, 2.

Harmless error in charging doctrine, see INSTRUCTIONS, 10.

RES JUDICATA.

See JUDGMENTS, 10-17.

Matters concluded by judgment of dismissal of amended complaint, see PLEADING, 22.

RESTRAINT OF TRADE.

See MONOPOLIES.

RESULTING TRUST.

See TRUSTS AND TRUSTEES, 1-13.

REVENUE.

See TAXATION.

REVERSIBLE ERROR.

See APPEAL AND ERROR.

REVERSIONS.

See REMAINDERS AND REVERSIONS.

REVOCATION.

Of conditional assent to modification of lease, see LANDLORD AND TENANT, 5.

Of instrument creating trust, see TRUSTS AND TRUSTEES, 40.

Of wills, see WILLS, 11-16.

RIGHT TO FOLLOW OCCUPATION.

See CONSTITUTIONAL LAW, 15.

RIGHT OF WAY.

Taxation, see TAXATION, 9.

ROADWAY.

Taxation, see TAXATION, 8.

ROBBERY.

Liability of railroad for robbery of passenger, see CARRIERS OF PASSENGERS, 10.

RULE OF PROPERTY.

Decision establishing rule of property as precedent, see STARE DECISIS, 7.

RULES.

Of carrier, see CARRIERS OF PASSENGERS, 3, 4, 13.

RULES OF COURT.

See COURTS, 3, 4.

Judicial notice, see EVIDENCE, 3.

SABBATH.

See SUNDAYS AND HOLIDAYS.

SAFETY DEPOSIT.

Liability of lessor of safe deposit box, see BAILMENTS, 3-6.

SALES.

See WARRANTY.

Action to rescind contract for purchase of automobile, see RESCISSION, CANCELLATION AND REFORMATION, 7.

Judicial sale, see JUDICIAL SALES.

Parol evidence to vary sale contract, see EVIDENCE, 29.

Sales of realty, see VENDOR AND PURCHASER.

1. When title passes.—Under uniform sales act (Code Pub. Civ. Laws, art. 83), § 43, providing that, unless otherwise provided goods remain at the seller's risk until property therein is transferred, and section 40, rule 5, providing that if a contract requires delivery by seller to buyer, or at a particular place or payment of freight or cost of transformation to buyer or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon, where a carload of fertilizer, shipped under a contract providing for delivery at the buyer's works, and that the buyer may return it if not of standard quality after a chemical analysis, is destroyed by fire while standing on the buyer's side track before he has had a reasonable opportunity to make the analysis, the absolute right conferred on the buyer, title does not pass until an opportunity for making the tests is afforded, and the loss is on the seller. *Agri Mfg. Co. v. Atlantic Fertilizer Co. (Md.)* 1918D-396.

(Annotated)

2. Duty on election to rescind.—Under St. 1908, c. 237, known as the Uniform Sales Act § 69, subd. 3, on rescission of a contract to enable the purchaser to recover the purchase price, the plaintiff must notify the defendant within a reasonable time of his election to rescind, and must return or offer to return the property in substantially as good condition as when received by him. *Collins v. Skillings (Mass.)* 1918D-424.

(Annotated)

3. The word "offer," as used in St. 1908, c. 237, § 69, subd. 3, providing that the buyer to rescind a sale must offer within a reasonable time to return the goods, is synonymous with the word "tender." *Collins v. Skillings (Mass.)* 1918D-424.

(Annotated)

4. Failure of seller to deliver.—Under Uniform Sales Act (Pub. Acts 1913, No. 100), where parties make a present sale of wool, the seller, when sued for failure to deliver, cannot stand on any right to retain the goods until payment is made of the entire stipulated price, where he has tendered. delivery of wool which includes more than the
Ann. Cas. Dig. 1918C-E.—13.

stipulated quantity of fine wool which the buyer has declined to accept and pay for at the full price, but has offered to take it and to pay a less price for the fine wool in excess of the stipulated quantity. *Powers v. Dodgson (Mich.)* 1918D-422.

(Annotated)

5. Evidence.—In an action by the seller to determine who shall bear the loss of a shipment of fertilizer under a contract giving the buyer the right to have an individual carload tested, evidence as to the quality of other shipments under the contract is properly excluded. *Agri Mfg. Co. v. Atlantic Fertilizer Co. (Md.)* 1918D-396.

6. Measure of damages.—Where the seller of goods to which title has passed to the buyer refuses to deliver them and sells them to another, the measure of damages is the difference between what the buyer was to pay and the value of the goods when sold to another. *Powers v. Dodgson (Mich.)* 1918D-422.

(Annotated)

7. Rescission of written contract by parol. A written contract for the sale of goods may be rescinded by a subsequent parol agreement though the latter agreement is not independently enforceable because not in conformity with the sale of goods act. *Morris v. Barron (Eng.)* 1918C-1197.

(Annotated)

8. Conditional Sales — Destruction of goods.—Under Pub. Acts 1907, c. 212, § 22, providing that where delivery of goods sold has been made to the buyer in pursuance of contract, and the property therein has been retained by the seller merely to secure performance of the contract, the goods are at the buyer's risk from the time of delivery, a buyer who purchased a piano under a conditional sale contract, which contained an agreement by him to make certain payments in instalments and to insure the piano for its full value, must pay the purchase price, notwithstanding the destruction of the piano by fire, not caused by his negligence, at a time when it was not insured. *O'Neill-Adams Co. v. Eklund (Conn.)* 1918D-379.

(Annotated)

SALOONS.

See INTOXICATING LIQUORS.

SCHOOL LANDS.

See PUBLIC LANDS.

SCHOOLS.

Joinder of relators in mandamus to compel admission of pupil to school without payment of fee, see MANDAMUS, 3.

1. Compelling admission of pupil without fee.—In mandamus by parents against a school teacher and a board of education to compel the reception of the parents' children by a claimed public school without fee, it is immaterial whether the teacher,

in demanding the fee and excluding the children for nonpayment, is acting by authority of the board of education of the county, or the local board of the town, since the teacher's duty to conduct the school according to law and the statutes can be enforced by mandamus whether one board or the other had the right to control the school. *Hughes v. Outlaw* (Ala.) 1918C-872.

2. Teaching of music.—Under the provisions of section 7478 of the General Statutes of 1909, it is competent for a school district board to provide that other branches shall be taught than those specifically enumerated in the section, and in the discretion of the board they may provide for instruction in music by a qualified teacher. *Epley v. Hall* (Kan.) 1918D-151. (Annotated)

3. The uniform course of study prepared by the state board of education for the common schools of the state for the year 1914, under the authority of chapter 272 of the Laws of 1913, authorizes the teaching of music in such schools. *Epley v. Hall* (Kan.) 1918D-151. (Annotated)

4. It is within the discretion of the school district boards to determine whether all subjects, including music, shall be taught by a single teacher or to provide that music shall be taught by another teacher, provided such other possesses the qualifications and authority required by the school laws. *Epley v. Hall* (Kan.) 1918D-151. (Annotated)

5. Graduating exercise in church—Infringement of religious freedom.—Where a school board permits parts of graduating exercises to be held in churches, but without religious services, and at some of the exercises allows clergymen to deliver nonsectarian prayers, it does not violate Const. art. 10, § 3, prohibiting sectarian instruction in public schools. *State v. District Board* (Wis.) 1918C-584. (Annotated)

6. Where the school board holds parts of graduating exercises in churches, and allows various clergymen to deliver nonsectarian prayers and invocations at some of the exercises, but no compensation is paid for the use of the churches, or for the prayers, parents of school children, though violently opposed to the churches in which the exercises were held, are not compelled to support any minister or visit places of worship, in violation of Const. art. 1, § 18, declaring that the right of every man to worship God shall remain inviolate, and no man shall be compelled to attend, erect, or support any place of worship, or maintain any minister, for parents objecting need not attend such exercises. *State v. District Board* (Wis.) 1918C-584. (Annotated)

SCIENTER.

Necessity of knowledge as to falsity of representations, see FRAUD, 2.

SCOPE OF EMPLOYMENT.

Of chauffeur, see AUTOMOBILES, 5-11.

SEALS.

Effect as importing consideration for release, see RELEASE AND DISCHARGE, 1, 5.

SEDUCTION.

1. Offer of marriage as defense.—Under Cr. Code 1912, § 389, providing that any male above the age of sixteen years who by any means of deception and promise of marriage seduces any unmarried woman shall, upon conviction, be deemed guilty of misdemeanor, and that, if the defendant in any action shall contract marriage with such woman, either before or after the conviction, further proceedings shall be stayed, an unaccepted offer of marriage does not come within the savings clause. *State v. Whitaker* (S. C.) 1918E-467.

2. False promise of marriage.—Under such section defendant's promise of marriage, by which he deceives a woman and thereby induces her to surrender her virtue, without intending to fulfil his promise, is punishable. *State v. Whitaker* (S. C.) 1918E-467.

3. Corroboration of prosecutrix.—In a prosecution under such section, evidence is held to sufficiently corroborate the testimony of the prosecutrix, so that the jury might have reasonably inferred that defendant did not intend to marry her when he went away or to fulfil his promise to marry her when he thereby induced her to consent to intercourse. *State v. Whitaker* (S. C.) 1918E-467. (Annotated)

4. Instructions.—A charge that, without discussing the evidence, the presiding judge thought there was some evidence as to every ingredient of the crime, and that the child was some corroboration, and that there was some other corroboration, is not objectionable as a charge on the facts. *State v. Whitaker* (S. C.) 1918E-467.

5. Settlement of bastardy proceeding as bar.—An action by the father of a minor daughter to recover damages for her seduction is not barred by her bastardy proceeding against defendant under Code 1906, c. 15, which was settled by the payment of \$200 to her. *Delancey v. Byrd* (Miss.) 1918D-668. (Annotated)

SEEDS.

Warranty as to germinating power, see WARRANTY, 1-4.

SELECTIVE DRAFT ACT.

See ARMY AND NAVY, 1-7.

SELF DEFENSE.

Self defense in trial for assault with intent to kill, see ASSAULT, 2.

SELF-EXECUTING PROVISIONS.

Of constitution, see CONSTITUTIONAL LAW, 19-21.
Of insurance policy, see INSURANCE, 48.

SELF-SERVING DECLARATION.

See DECLARATIONS AND ADMISSIONS..
As to intent of insured in taking bichloride tablets, see LIFE INSURANCE, 14.

SENTENCE AND PUNISHMENT.

Excessiveness of sentence in prosecution for illegal sale of liquor, see INTOXICATING LIQUORS, 20.

SEPARATE PROPERTY.

Of wife, see HUSBAND AND WIFE, 8-12.

SERVANT.

See MASTER AND SERVANT.

SET-OFF AND COUNTERCLAIM.

Necessity of pleading set-off in action on account, see ACCOUNTS, 2.
Set-off of previous winnings in action to recover money lost at gaming, see GAMING, 7.

1. Counterclaim against compensation.—In an action by an agent for compensation, loss alleged to have been sustained by the principal from the agent's unfaithful discharge of the contract on which he sues is a proper subject of counterclaim under Kirby's Dig. § 6099, providing that a "counterclaim" must be a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action, whether such acts are considered as torts or breaches of contract duties. *Neely v. Wilmore* (Ark.) 1918D-77. (Annotated)

SETTLED CASE.

Necessity for settled case to review order disposing of motion for new trial, see APPEAL AND ERROR, 26.

SETTLEMENT.

Of decedent's estate, see EXECUTORS AND ADMINISTRATORS.

SEVERABLE CONTRACT.

See CONTRACTS, 24.

SEXUAL INTERCOURSE.

See RAPE; SEDUCTION.
Refusal as ground for annulment of marriage, see MARRIAGE, 11-14.

SHERIFFS AND CONSTABLES.

Allowance as costs of sheriff's fees for serving notice of appeal, see APPEAL AND ERROR, 121.
Sheriff's sales, see JUDICIAL SALES, 1, 2.

SHERMAN ANTI-TRUST LAW.

See MONOPOLIES.

SHIPS AND SHIPPING.

See CARRIERS OF GOODS.

1. Provision for arbitration.—A provision in a charter party that all disputes should be settled by arbitration, etc., cannot be regarded as providing for assessment of the amount of damages claimed, leaving the question of liability for the courts, and so is no bar to an action in court, even if it may support an action for breach of the agreement to arbitrate. *Aktieselskabet Korn-Og, etc. v. Rederiaktiebolaget* (U. S.) 1918E-491.

2. Where no arbitration had actually been begun and expenses incurred, only nominal damages can be recovered for a breach of a covenant in a charter party providing for arbitration of all disputes. *Aktieselskabet Korn-Og, etc. v. Rederiaktiebolaget* (U. S.) 1918E-491.

3. Provision for penalty.—A clause in a charter party, "penalty for nonperformance of its agreement to be proven damages, not exceeding estimated amount of freight," is a provision for a penalty, and cannot be construed to limit the recovery of the charterer for the owner's entire repudiation of the charter and refusal to enter on its performance. *Aktieselskabet Korn-Og, etc. v. Rederiaktiebolaget* (U. S.) 1918E-491.

4. In view of a provision of the charter party for arbitration of disputes before referees, one to be selected by the captain, a clause in the charter party declaring that the penalty for nonperformance should not exceed the estimated amount of freight, though accepted as a limitation of liability, cannot be deemed applicable to the case of an entire repudiation of the charter. *Aktieselskabet Korn-Og, etc. v. Rederiaktiebolaget* (U. S.) 1918E-491.

SHOWS.

See THEATERS AND AMUSEMENTS.

SIDEWALKS.

Street as including sidewalk, see **STREETS AND HIGHWAYS**, 1.

SIGNAL.

Failure to give signal of approach of train, see **RAILROADS**, 15, 18.
Requiring signal from driver of automobile, see **AUTOMOBILES**, 2.

SILENCE.

Admission by silence, see **ADMISSIONS AND DECLARATIONS**, 10-12.

SLANDER.

See **LIBEL AND SLANDER**.

SMALLPOX.

Maintenance of pesthouse by city, see **MUNICIPAL CORPORATIONS**, 19, 20.

SOCIAL CLUB.

As exempt from taxation, see **TAXATION**, 25, 26.

SOLDIERS.

See **ARMY AND NAVY**.
Receiving property of soldier, see **ARMY AND NAVY**, 8, 9.

SOLICITING BUSINESS.

By attorney as misconduct, see **ATTORNEYS**, 19, 20.

SPARE TIME WORK.

Compensation to insured spare time worker, see **MASTER AND SERVANT**, 19-25.

SPECIAL ASSESSMENT.

See **TAXATION**, 44-51.
Agreement to exempt from special assessment as covenant running with land, see **DEEDS**, 9.
Apportionment as between life tenant and remainderman of assessment for public improvements, see **LIFE ESTATES**, 23-25.
As incumbrance, see **DEEDS**, 11, 12.
Payment from principal or income of trust estate of assessments for improvements, see **TRUSTS AND TRUSTEES**, 27.

SPECIAL ELECTIONS.

See **ELECTIONS**.

SPECIAL LEGISLATION.

See **CONSTITUTIONAL LAW**, 17.

SPECIFIC PERFORMANCE.

Of agreement to arbitrate, see **ARBITRATION AND AWARD**, 1.
Of award of arbitrators, see **ARBITRATION AND AWARD**, 5, 14, 15.
Of contract to exercise power by will, see **POWERS**, 1, 2.

1. Contract for exchange of land.—A contract of exchange of real estate may be specifically enforced the same as one for ordinary sale, and the vendee may have a specific performance of that part of the contract which the vendor can perform, with compensation for that part which he cannot perform; the same as in ordinary cases of sales of real estate. *Mundy v. Irwin* (N. Mex.) 1918D-713. (Annotated)

2. Title not good of record.—Although the grantor has a good title by reason of adverse possession, a contract of sale of such land cannot be specifically enforced unless good title is shown of record, because a purchaser does not have to take a title which will have to be proved by parol evidence. *Cross v. Buskirk-Rutledge Lumber Co.* (Tenn.) 1918D-933.

3. Slight deficiency in acreage.—Where the findings of the court show, at least inferentially, that the defendant bought by the tract, rather than the acre, he cannot defeat specific performance on account of deficiency in area from that mentioned in the contract of sale. *Mundy v. Irwin* (N. Mex.) 1918D-713.

4. Cure of uncertainty.—Where a vendor puts his vendee into possession of real estate, an uncertainty of description in the contract of sale, which otherwise might prevent specific performance of the contract, is thereby cured. *Mundy v. Irwin* (N. Mex.) 1918D-713.

5. Contract of railroad to maintain depot.—The contract or covenant of a railway company with a land owner, in consideration of the grant of a right of way through his lands, and of land for depot purposes, to build and operate a depot on the grantor's land, not specifying the length of time, is not void per se, and may be specifically enforced so long as its performance by the railway company will not materially interfere with the rights and interests of the public to be served by such railway company; or it has not become otherwise unduly burdensome and inequitable. *Harper v. Virginian R. Co.* (W. Va.) 1918D-1081. (Annotated)

6. Specific performance of such contract will not be denied where no hardship or injustice will result, and where an action for damages can give the grantor no adequate re-

lief. *Harper v. Virginian R. Co.* (W. Va.) 1918D-1081. (Annotated)

7. In such a case the building and operation of a depot on the land granted for a short time will not amount to full performance of the grantee's covenant so long as the rights of the public to be served by the railway company have not intervened and continuance thereof has not become unjustly burdensome and inequitable to the railway company. *Harper v. Virginian R. Co.* (W. Va.) 1918D-1081.

8. Nor is such a contract so indefinite and uncertain in its terms, and because of the continuity of the acts required in specific performance, extending as they necessarily do into the future, as to be unenforceable in equity. *Harper v. Virginian R. Co.* (W. Va.) 1918D-1081.

9. But such contract or covenant will be enforced in a court of equity so long and so long only as it may be done consistently with the public interests and the duties and obligations of the railway company in respect thereto, and it has not become unduly burdensome and oppressive to continue compliance therewith. *Harper v. Virginian R. Co.* (W. Va.) 1918D-1081. (Annotated)

10. A subsequent deed between the same parties, correcting errors or enlarging boundaries, made pursuant to the previous contract and deed, and referring thereto, but omitting the covenant, will not be construed as a release of the covenant, when it appears from the terms of the latter deed and from the subsequent acts and conduct of the parties, that such release was not intended. *Harper v. Virginian R. Co.* (W. Va.) 1918D-1081.

11. In a suit for specific performance of such contract the burden is upon the railway company to show that it is no longer able to perform the covenant consistently with its duties to the public or that continuance thereof has become burdensome and oppressive, or otherwise inequitable. *Harper v. Virginian R. Co.* (W. Va.) 1918D-1081. (Annotated)

12. In the case at bar no adequate defense was interposed, nor showing made entitling the defendant to relief from specific performance of its covenant. *Harper v. Virginian R. Co.* (W. Va.) 1918D-1081. (Annotated)

13. Where the decree of specific performance in such case does not protect the public interests and the interest of the railway company in the future performance of its duties and obligations to the public, it may on appeal be modified in that particular, and as so modified, affirmed. *Harper v. Virginian R. Co.* (W. Va.) 1918D-1081.

SPEED.

Evidence as to speed of train, see EVIDENCE, 10, 11.

Excessive speed of train, see RAILROADS, 15.
Regulation of speed of automobile, see AUTOMOBILES, 1.

SPENDTHRIFT TRUST.

See TRUSTS AND TRUSTEES, 14.

As assets in hands of trustee of bankruptcy of beneficiary, see BANKRUPTCY, 1.

Right of testator to create, see WILLS, 38.

SPONTANEOUS UTTERANCES.

Admissibility of spontaneous utterances, see ADMISSIONS AND DECLARATIONS, 18, 19.

SPORTSMAN.

Liability for accidental shooting, see WEAPONS, 1-5.

SPRINKLING STREETS.

As improvement which will support special assessment, see TAXATION, 45.

SPUR TRACKS.

Authority to construct, see FRANCHISES, 1; STREET RAILWAYS, 1, 2.

Compelling removal, see STREET RAILWAYS, 3-5.

STAKEHOLDER.

Defined, see WORDS AND PHRASES, 10.

Recovery from stakeholder of money deposited by party to gambling contract, see GAMING, 4.

STAMPS.

Admissibility in prosecution for illegal sale of liquor of certified copy of internal revenue tax stamp, see INTOXICATING LIQUORS, 12.

STARE DECISIS.

Construction of federal statute by federal court as binding on state court, see COURTS, 5.

Decision of Louisiana supreme court as precedent in court of appeals, see COURTS, 7.

Decision of state court on question of general law as binding on federal court, see COURTS, 6.

Dictum, see COURTS, 8.

1. A decision, establishing a rule of property which had been adhered to for several centuries, should not be disturbed by the courts. *Purvis v. Shuman* (Ill.) 1918D-1175.

STATE BOARD OF EQUALIZATION.

See TAXATION, 13, 16-20.

STATE BOARD OF INSURANCE.

See **INSURANCE**, 8-15.

STATES.

See **UNITED STATES**.

Application of doctrine of laches to state, see **LACHES**, 1.

As party to divorce suit, see **DIVORCE**, 4, 17.
Power to regulate interstate commerce, see **INTERSTATE COMMERCE**, 1-4.

1. **Claim against state.**—Under section 109, Rev. Codes, no claim which is not provided for by law may be presented, audited, set off, or sued upon. *Davis v. State (Ida.)* 1918D-911.

2. **Time for presentation.**—Section 109, Rev. Codes, limits the time within which a claim against the state may be presented to the state board of examiners to two years after the claim has accrued. After the expiration of this period the state board of examiners is without jurisdiction to consider the claim. *Davis v. State (Ida.)* 1918D-911.

3. **Method of presentation.**—Under the provisions of section 10, art. 5, and section 18, art. 4, of our constitution the method prescribed for presenting and prosecuting to a conclusion the claims against the state is that in the first instance such claim must be presented in proper form to the state board of examiners; if rejected by said board, the supreme court has original jurisdiction of an action upon a proper claim and may in some cases give a recommendatory judgment, which in turn must be presented to the legislature to be by it allowed or disallowed. *Davis v. State (Ida.)* 1918D-911.

4. The fact that under section 10, art. 5, of the constitution the supreme court has original jurisdiction to hear claims against the state does not relieve claimants of the obligation in the first instance of presenting their claims to the state board of examiners. *Davis v. State (Ida.)* 1918D-911.

5. **Liability for negligence of servants.**—States cannot be sued without their consent, and when by constitutional or statutory provisions the state has permitted itself to be sued, such permission does not render the state liable for the careless or negligent acts of its servants, employees, or agents in the absence of any statute expressly fixing such liability upon a state. *Davis v. State (Ida.)* 1918D-911. (Annotated)

6. The word "claims," as sued in article 5, § 10, of the constitution of this state, does not include any claim for damages caused by the careless or negligent acts of the state's servants, employees, or agents, and in the absence of any statute expressly making the state liable in such cases no such liability exists. *Davis v. State (Ida.)* 1918D-911. (Annotated)

7. Complaint of D. alleged that the state of Idaho owned and operated an irrigation system; that by reason of the negligence and carelessness of the state and its servants, em-

ployees, and agents a ditch of said system broke, causing large quantities of water to flow upon, over and across D.'s land, resulting in the alleged damage. Held not to state a cause of action as against the state, and not to disclose a state of facts giving rise to a "claim" within the meaning of article 5, § 10, of the constitution. *Davis v. State (Ida.)* 1918D-911. (Annotated)

8. Held that, in the absence of a statute or constitutional provision making the state as a proprietor liable for the careless or negligent acts of its servants, employees, or agents, this court is without jurisdiction to grant any relief to plaintiff, under the facts alleged in plaintiff's complaint. *Davis v. State (Ida.)* 1918D-911. (Annotated)

STATUTE OF FRAUDS.

See **FRAUDS**, **STATUTE OF**.

STATUTE OF LIMITATIONS.

See **LIMITATION OF ACTIONS**.

STATUTES.

1. **Constitutional Requirements as to Title and Subject**, 198.
2. **Enactment**, 199.
3. **Recitals**, 199.
4. **Effect of Partial Invalidity**, 199.
5. **Construction**:
 - a. **Words Given Their Ordinary Meaning**, 199.
 - b. **Relative Words**, 199.
 - c. **Interpretation of Particular Words and Phrases**, 200.
 - d. **Practical Construction**, 200.
 - e. **Statutes in Pari Materia**, 200.
 - f. **Curative Act**, 200.
6. **Amendment or Repeal**, 200.

See **CONSTITUTIONAL LAW**.

Construction of statute of limitations, see **LIMITATION OF ACTIONS**, 1.

Nullification of constitution, see **CONSTITUTIONAL LAW**, 1.

Title of act creating state insurance board, see **INSURANCE**, 14.

Title of statute limiting consecutive service of public officers, see **PUBLIC OFFICERS**, 4.

1. **Constitutional Requirements as to Title and Subject.**

1. **Montana "war defense act."**—Laws 1918 (Ex. Sess.) c. 21, entitled "An act appropriating the sum of" \$500,000 to be "expended by the Montana council of defense in aiding and assisting the United States in carrying on and prosecuting the war now existing between the United States and the German and Austrian Empires," designating the purposes for which such appropriation may be expended, authorizing the state board of examiners to issue bonds or warrants in

excess of the constitutional limit of indebtedness, to make rules and regulations governing the expenditure and make temporary loans, etc., contains only one subject, clearly expressed in its title, as required by Const. art. 5, § 23. *State v. Stewart* (Mont.) 1918D-1101.

2. The act is not subject to the objection that it "appropriates money, but such appropriation is not made by a separate bill expressing one subject," as required by Const. art. 5, § 33. *State v. Stewart* (Mont.) 1918D-1101. (Annotated)

3. Act relating to osteopathy.—Const. art. 5, § 23, requiring an act to contain but one subject, to be clearly expressed in its title, is not contravened by Laws 1907, c. 112, entitled an act to amend Laws 1905, c. 51, §§ 8, 12, relating to the practice of osteopathy, and defining what evidence shall be deemed sufficient to constitute the practice of osteopathy, defining practice of osteopathy so as to include practice of chiropractic, by making it applicable to every branch of the healing art by use of the hands. *State v. Hopkins* (Mont.) 1918D-956.

2. Enactment.

4. Vote by ayes and nays.—Laws 1915, p. 781, establishing a minimum wage for females, originated in the Senate where it was duly passed, and on transmission to the House, it was amended. When the bill was returned, the Senate concurred in the amendments, and ordered the bill engrossed, but the bill as engrossed omitted the word "mercantile" before "establishments." The vote on the engrossed bill was taken by ayes and nays recorded in the journal, but the other votes adopting the amendment were not so taken. It is held that notwithstanding the error in the bill as engrossed, there was a compliance with Const. art. 5, § 21, declaring that no bill shall become a law unless on its final passage the vote be taken by ayes and nays, for that section does not apply to a vote of the house which originated the bill when concurring in amendments of another house, and the Senate which originated the bill had already passed it in compliance with the section. *State v. Crowe* (Ark.) 1918D-460.

5. Proof of enactment.—A duly enrolled bill, although publicly signed by the presiding officer of each house, in the presence of the house over which he presides, while the same was in session and capable of doing business, and afterward approved by the governor and filed by him with the secretary of state, may be impeached on the ground that it has not received a constitutional majority of the members elect of both branches of the general assembly, and upon this question the legislative journals must provide the appropriate as well as the conclusive evidence. *Ritzman v. Campbell* (Ohio) 1918D-248. (Annotated)

6. Such enrolled bill, so authenticated, is conclusive upon the courts as to the contents thereof, since the attestation of the presiding officers of the general assembly is a solemn

declaration of a co-ordinate branch of the state government that the bill as enrolled was duly enacted by the legislature. *Ritzman v. Campbell* (Ohio) 1918D-248.

(Annotated)

3. Recitals.

7. Title as sufficient recital.—As the title is an essential part of a statute, the recital contained in the title of a special or local statute that due notice was given of the intention to apply for the passage of the act is contained in the act, within the requirement of article 50 of the constitution. *Gretna v. Bailey* (La.) 1918E-566.

4. Effect of Partial Invalidity.

8. Reciprocal demurrage act.—The provisions of the Reciprocal Demurrage Act (sections 6159-6167, Rev. St. 1913) relating to intrastate and interstate commerce are held to be separable, and the act, as applied to commerce within the state, is held not to violate the Constitution of the United States or the constitution of the state of Nebraska. *Sunderland Bros. Co. v. Missouri Pac. Ry. Co.* (Neb.) 1918D-1120. (Annotated)

9. Invalid parts inseparable.—A statute that is in part unconstitutional and invalid must be decreed entirely invalid if its provisions are so interrelated that it cannot be presumed that the legislature would have enacted the provisions which do not violate the constitution independently of the provisions that are found to be unconstitutional or invalid. That doctrine is particularly applicable to a referendum statute, because of the improbability that a majority of the electors who voted for its adoption or rejection would have voted for the adoption of the provisions that do not violate the constitution, independently of the provisions subsequently decreed to be unconstitutional and invalid. *Gretna v. Bailey* (La.) 1918E-566.

10. While, if only a portion or a proviso of the statute is unconstitutional, the remainder may be upheld, such rule does not apply where the portions of the statute are inseparably connected and dependent upon each other. *Keith v. Lockhart* (N. C.) 1918D-916.

5. Construction.

a. Words Given Their Ordinary Meaning.

11. The presumption is that the words of a statute are used in their ordinary significance. *Corbin v. Baldwin* (Conn.) 1918E-932.

b. Relative Words.

12. It is a rule of construction that relative words must ordinarily be referred to the next antecedent where the intent upon the whole instrument does not appear to the contrary. *Traverse v. Blair Tp.* (Mich.) 1918E-81.

13. It is a rule of construction that the last antecedent is the last word which can be made an antecedent without impairing the

meaning of the sentence. *Traverse v. Blair Tp.* (Mich.) 1918E-81.

c. Interpretation of Particular Words and Phrases.

14. "As now established."—In a statute forbidding the sale of intoxicants westerly of the fire limits of a city "as now established" the words "as now established" refer to the time of the enactment of the statute and not to the time of its taking effect. *Carr v. Washington, etc. R. Co.* (D. C.) 1918D-818. (Annotated)

d. Practical Construction.

15. Cannot defeat purpose of people and legislature.—Although where there is a doubt concerning the meaning of a statute, a long-continued practical construction will be considered in determining the construction to be given it by the courts, where the constitutional and statutory provisions plainly provided that all fees and allowances received by county officers in excess of their lawful compensation should be paid into the county treasury, the fact that it is customary for public officers to appropriate interest on public funds will have no weight, and cannot be permitted to defeat the purpose of the people in adopting the constitution or the legislature in enacting the law. *Lake County v. Westerfield* (Ill.) 1918E-102.

e. Statutes in Pari Materia.

16. Pub. Loc. Laws 1915, c. 116, relating to elections to determine whether the stock law or the fence law should control, and chapter 505, relating to the taxes to be imposed should a fence be required, are in pari materia, and must be construed together as one and the same law, especially as the later statute refers to the former. *Keith v. Lockhart* (1918D-916).

f. Curative Act.

17. A curative act or a conclusive evidence clause in a statute is effective to cure all defects resulting from a failure to comply with provisions which are merely directory of the mode of the exercise of a power. *People v. Van Nuys Lighting Dist.* (Cal.) 1918D-255.

18. Defects and omissions which go to the jurisdiction of the board of county supervisors to act, and which make their action absolutely void, cannot be cured by subsequent curative acts or conclusive evidence clauses. *People v. Van Nuys Lighting Dist.* (Cal.) 1918D-255.

19. The attempt to validate by a curative act, a tax levied by a pretended corporation having no legal authority over the property taxed, would, if given effect, be equivalent to the imposition of an obligation by statute without due process of law. *People v. Van Nuys Lighting Dist.* (Cal.) 1918D-255.

6. Amendment or Repeal.

20. Construction.—In the construction of amendments to the constitution or to statutes, the body enacting the amendment will be presumed to have had in mind existing constitutional or statutory provisions and their judicial construction touching the subject dealt with. *American Woodenware Mfg. Co. v. Schorling* (Ohio) 1918D-318.

STIPULATION OF FACTS.

Stipulation of facts on appeal, see **APPEAL AND ERROR**, 43.

STOCK AND STOCKHOLDERS.

See **CORPORATIONS**, 23-42.

STOCK DIVIDENDS.

As part of corpus of trust estate or of income, see **TRUSTS AND TRUSTEES**, 17.

STOCK OF GOODS.

Mortgage of, see **CHATTEL MORTGAGES**, 2-6.

STORAGE.

Cold storage of food, see **FOOD**, 1-4.
Regulation of storage of gasoline, etc., see **EXPLOSIONS AND EXPLOSIVES**, 1-3.

STORING.

What constitutes storing of gasoline on premises, see **FIRE INSURANCE**, 14.

STREET RAILWAYS.

See **CARRIERS OF PASSENGERS**.

Consent by city to construction of double spur track as grant of additional franchise, see **FRANCHISE**, 1.

Contributory negligence of person struck by automobile after alighting from car, see **AUTOMOBILES**, 3, 4.

Street car as vehicle required to give way to overtaking vehicle, see **STREETS AND HIGHWAYS**, 8.

1. Rights as to turnouts.—A spur track to a lot on which a street railway constructed car barns for taking care of its animals, before the advent of motor power, and for storage purposes, and the lot itself, is a necessary turnout and appurtenance under a special charter, giving it "desired turnouts and appurtenances." *Dayton v. South Covington, etc. St. R. Co.* (Ky.) 1918E-229.

2. Provisions in an ordinance as to the rights as between a city and a street railroad as to the "tracks" of the latter apply to

turnouts; they being necessary appurtenances. *Dayton v. South Covington, etc. St. R. Co. (Ky.) 1918E-229.* (Annotated)

3. Compelling removal of tracks.—In an action wherein a city desires to tear up and abate certain spur tracks of a street railway on the ground that the street railway had no further use for them, evidence is held to show that such spur tracks and certain car barns were useful and necessary to the street railway company. *Dayton v. South Covington, etc. St. R. Co. (Ky.) 1918E-229.*

4. *Ky. St. § 3490, subd. 25, vesting a city with the right to exercise "a supervisory control over the use of streets, and shall regulate the speed of cars, signals, and fare on street cars," gives a city no authority to remove spur tracks. Dayton v. South Covington, etc. St. R. Co. (Ky.) 1917E-229.*

5. A city cannot remove, abate, or destroy spur tracks of street railways under its right of exercising its police power, as a city only possesses such police power as may be expressly or by implication delegated to it by the legislature through its charter, and then only on the ground that it is a nuisance, and the term "nuisance" is limited to such things as the common law or the statute declares to be a nuisance, and perhaps those things which in their nature may be nuisances, and a municipality cannot declare what shall constitute a nuisance. *Dayton v. South Covington, etc. St. R. Co. (Ky.) 1918E-229.*

6. Collision—Negligence of street car conductor.—Where a street railway's conductor in charge of a motor and trailer after walking upon straight railroad tracks gave the signal to the motorman to attempt the crossing, so that, though the motor got over the tracks, the trailer was struck by a train, the street railway is negligent, though the dust and noise of another train, which the motor had stopped to let go by, hindered the conductor's seeing and hearing the approaching train. *Memphis St. R. Co. v. Cavell (Tenn.) 1918C-42.* (Annotated)

STREETS AND HIGHWAYS.

1. Definitions and General Consideration, 201.

2. Use of Streets:

- a. Regulation of Use, 201.
- b. Law of the Road, 201.
- c. Injuries, 201.

3. Injuries Arising from Defects in Street:

- a. Liability of Municipality, 202.
- b. Right to Indemnity from Abutter, 202.

1. Definitions and General Consideration.

Injuries at railroad crossings, see **RAILROADS**, 14-20.

Regulation of operation of automobiles, see **AUTOMOBILES**, 1, 2.

1. Street as including sidewalk.—The streets of a city or town extend to and include that part thereof occupied and used

for sidewalks. *Chicago, etc. R. Co. v. Redding (Ark.) 1918D-183.*

2. Use of Streets.

a. Regulation of Use.

2. Regulation of use for profit.—No private individual or corporation has a right to use the streets as a common carrier for gain, without consent of the state upon such terms as are prescribed by the state or municipality, such use being accorded as a mere privilege and not as a matter of right. *Hadfield v. Lundin (Wash.) 1918C-942.*

3. As to the rights of citizens to use the streets in the ordinary way, the legislative power is confined to regulation, while as to the use of the streets for business for private gain, the power is plenary and extends to absolute prohibition. *Hadfield v. Lundin (Wash.) 1918C-942.*

4. The right of a common carrier as such to use the streets is a mere license or privilege, which the legislature may prohibit entirely without violating any provision of the federal or state constitution. *Hadfield v. Lundin (Wash.) 1918C-942.*

5. The legislature having the power to prohibit the use of streets for carrying on a business for private gain, the reasonableness of any regulation with reference thereto is a legislative question pure and simple. *Hadfield v. Lundin (Wash.) 1918C-942.*

6. The power to prohibit the use of streets for private business includes the power to regulate, although under given conditions regulation may be tantamount to a prohibition. *Hadfield v. Lundin (Wash.) 1918C-942.*

b. Law of the Road.

7. Driving on left side of street.—Driving along the left-hand side of a street is not, of itself, negligence; but becomes so, if at all, only because of the surrounding circumstances, or because forbidden by law or ordinance. *Harris v. Johnson (Cal.) 1918E-560.*

8. Overtaking vehicles—Street car.—With in an ordinance which after providing that vehicles shall, on all occasions, travel on the right-hand side of a street, provides that one in overtaking and passing another vehicle shall pass to the left of such vehicle, and the person in charge of the vehicle overtaken shall give way to the right, a street car is not a vehicle, as it cannot give way to the side. *Harris v. Johnson (Cal.) 1918E-560.* (Annotated)

c. Injuries.

9. Evidence of negligence.—Driving on the left-hand side of the street, in violation of ordinance, is presumptive evidence of negligence, which, if not excused by the circumstances shown, is sufficient proof to support recovery by one injured thereby. *Harris v. Johnson (Cal.) 1918E-580.*

10. Permitting improper use of street.—A city is liable for personal injuries resulting from permitting the use of streets for racing

and testing automobiles; such streets not being reasonably safe for ordinary street purposes. *Burnett v. Greenville* (S. C.) 1918C-363. (Annotated)

3. Injuries Arising from Defects in Street.

a. Liability of Municipality.

11. **Duty as to Condition of Street.**—A statute making a city liable for injuries occurring "through a defect in any street" imposes on the city a duty of keeping the street in such physical condition that it is reasonably safe for street purposes. *Burnett v. Greenville* (S. C.) 1918C-363.

12. **Banana peel on sidewalk.**—A petition in an action by a pedestrian against a municipal corporation for damages on account of personal injuries received from a fall caused by stepping on a banana peel on a much-frequented sidewalk in the business section of the city was demurrable as failing to set forth a cause of action, where the only allegation as to omission of duty upon the part of the municipality was the general allegation that the city negligently allowed objects of that character to remain on the sidewalks of the city, and the only allegation as to notice to the city of the presence of the object on the sidewalk was that from the color of the particular banana peel it appeared to have been discarded from twenty-four to twenty-eight hours, and that banana peels were frequently to be found on the sidewalks of the city, and the particular peel gave evidence by its partially dried and browned condition of having been on the sidewalk for some time. *Boney v. Dublin* (Ga.) 1918E-176. (Annotated)

13. **Injury from picking up electric wire.**—In an administratrix's actions against city and electric companies for death of her adopted son from electric shock when he picked up a broken wire lying in the grass beside the sidewalk, whether the accident occurred within the limits of the highway or outside of it is held to be for the jury. *Boutlier v. Malden* (Mass.) 1918C-910.

14. In such action evidence is held to be sufficient to justify finding that plaintiff's intestate was a traveler on the highway. *Boutlier v. Malden* (Mass.) 1918C-910.

15. In such action, where the first and second counts of the declaration allege that decedent was a traveler on the highway, and was injured by reason of a defect and want of repair in the way, but there is nothing to show when the wire was broken, or how long it had been hanging in the street, and there is no evidence that the city knew, or by the exercise of proper care and diligence might have had reasonable notice, of a defect in the way, if such existed, verdict is rightly ordered for the city. *Boutlier v. Malden* (Mass.) 1918C-910.

b. Right to Indemnity from Abutter.

16. A judgment against a city for injuries to a pedestrian from the icy condition of a sidewalk, in an action in which the property owner was notified to defend, is not con-

clusive against the owner as to any defense which, while relevant to her, could not have been introduced in the action against the city. *Philadelphia v. Bergdoll* (Pa.) 1918C-1141.

17. A city is not entitled to recover of a property owner damages paid to a pedestrian for injuries resulting from the icy condition of the sidewalk in front of the owner's property, where the judgment against the city was based on evidence of constructive notice of the condition of the walk for a period of ten days, while at the time of the accident the premises were occupied by a tenant, and no actual notice of the condition of the sidewalk was brought to the owner, and she had not visited the house or been in its neighborhood during the continuance of the nuisance. *Philadelphia v. Bergdoll* (Pa.) 1918C-1141. (Annotated)

STRIKES.

See LABOR COMBINATIONS, 1, 9.

SUBROGATION.

Assignment of moneys due under building contract as prior to right of subrogation of surety, see, ASSIGNMENTS, 10, 14.

1. **Nature of right.**—Subrogation is not a matter of strict right, nor does it necessarily rest on contract, but is purely equitable in its nature; and, since it is a creature of equity, it will not be enforced where it will work injustice to the rights of those having equal equities. *Wasco County v. New England Equitable Ins. Co.* (Ore.) 1918E-656.

2. **Compensated surety.**—A paid surety may claim benefits of subrogation. *Wasco County v. New England Ins. Co.* (Ore.) 1918E-656. (Annotated)

3. **Surety on contractor's bond.**—As between a contractor's surety, the contractor, and a county employing a contractor, the surety paying claims against the contractor in default may claim the benefits of subrogation, because it has paid debts due to third persons acting on compulsion and not as a mere volunteer. *Wasco County v. New England Equitable Ins. Co.* (Ore.) 1918E-656.

4. **Subrogation as against coparties.**—A railroad which, though aggrieved by only a part of a judgment, by appealing from the whole thereof on affirmance has judgment directed against it on its supersedeas bond for the entire judgment appealed from is entitled to be subrogated, upon payment of the judgment, to the rights of plaintiff in his judgment against the other defendants. *Simmons v. Northern Pac. R. Co.* (Wash.) 1918C-1184.

SUBSCRIPTIONS.

To corporate stock, see CORPORATIONS, 23-34. In voting contest, see FRAUD, 10-13.

SUBTERRANEAN WATERS.

See **WATERS AND WATERCOURSES.**

SUCCESSION TAXES.

See **TAXATION**, 52-58.

SUICIDE.

Admissions of insured to show suicide, see **ADMISSIONS AND DECLARATIONS**, 5, 6.

SUIT MONEY.

See **ALIMONY AND SUIT MONEY.**

SUMMARY JUDGMENT.

Against sureties on appeal bond, see **APPEAL AND ERROR**, 115-120.

Against surety on injunction bond, see **INJUNCTIONS**, 22, 23.

SUNDAYS AND HOLIDAYS.

1. **Validity of Sunday laws.**—Sunday ordinances are generally upheld on the ground that the observance of Sunday is promotive of the moral and physical well-being of society; and such ordinances are a valid exercise of the police power, and constitutional. *State v. Davis* (N. C.) 1918E-1168.

2. A town whose charter specifically authorizes its board of aldermen to make regulations to cause the due observance of Sunday, if not thereby authorized to enact Sunday regulations, was authorized thereto by Revisal 1905, § 2923, empowering cities and towns to make ordinances, rules, and regulations for the better government of the town as they may deem best. *State v. Davis* (N. C.) 1918E-1168.

3. **Regulations directed to particular business.**—An ordinance of a town, forbidding any drug store to sell any merchandise on Sunday, but not applying to the filling of prescriptions and the selling of any article for the relief of the sick, under a penalty of \$25 for every offense, and an ordinance forbidding any restaurant or lunch stand to open its doors on Sunday for the sale of any article whatever, except those conducted wholly as a restaurant, lunch stand, etc., excepting restaurant, etc., carried on in connection with a grocery store, afterwards amended to include vendors of soda water or any other place of business, under a penalty of \$5 for each offense, are not an unlawful discrimination between persons engaged in the same business, as the ordinances dealt with distinct and severable occupations, especially in the absence of any finding that those engaged in them came into competition with each other. *State v. Davis* (N. C.) 1918E 1168. (Annotated)

SUPPLEMENTAL BILL.

See **EQUITY**, 3.

SURETYSHIP.

Bar of action against surety as affecting suit for contribution by cosurety, see **LIMITATION OF ACTIONS**, 4.

Liability of surety on building contract, see **CONTRACTS**, 33, 34.

Parol evidence to show relation of parties to obligation, see **EVIDENCE**, 35.

Right of surety to subrogation, see **SUBROGATION**, 2, 3.

1. **Consideration.**—To support a contract of suretyship, it is not necessary that any consideration pass directly to the surety; but a consideration moving to the principal alone is sufficient. *Bonner Oil Co. v. Gaines* (Tex.) 1918C-574.

2. **Extension of time as consideration.**—An extension of time for the payment of a debt is sufficient consideration for a contract of suretyship. *Bonner Oil Co. v. Gaines* (Tex.) 1918C-574. (Annotated)

3. Where a corporation owes a debt upon open account which is due and unpaid, an extension of time for payment thereof upon execution of notes by the corporation and its president individually is a sufficient consideration to support the suretyship of the president, though he becomes a surety voluntary and not on the request of the corporation. *Bonner Oil Co. v. Gaines* (Tex.) 1918C-574.

4. **Plea of non est factum.**—Proof of conditional signing.—Under the plea of non est factum, in an action upon the bond of a sheriff, the sureties sued may, to escape liability, prove, by oral or documentary evidence, that the county court had notice that the bond was not to become operative by acceptance unless and until executed by other persons as sureties. *Raleigh County Ct. v. Cottle* (W. Va.) 1918D-510.

5. If such condition is violated by a premature acceptance, with knowledge or notice of the condition on the part of the obligee, it cannot recover on the instrument. *Raleigh County Ct. v. Cottle* (W. Va.) 1918D-510. (Annotated)

6. Where matters set up in a special plea in such action are provable under the general issue entered, the plea is properly rejected. *Raleigh County Ct. v. Cottle* (W. Va.) 1918D-510.

SURGEONS.

See **PHYSICIANS AND SURGEONS.**

SURVIVORSHIP.

Creating presumption of survivorship by will, see **WILLS**, 39, 40, 48.

TAXATION.

1. Power of Taxation, 204.
2. Assessment and Valuation:
 - a. Assessors, 204.
 - b. Valuation of Property, 204.
 - c. Description of Property, 205.
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Special assessment as incumbrance, see DEEDS, 11, 12.

Valuation for taxation as evidence of value in condemnation proceeding, see EMINENT DOMAIN, 13.

1. Power of Taxation.

1. Equality.—The public burdens of taxation must be equally imposed upon every citizen. *Walker v. Richmond* (Ky.) 1918E-1084.

2. Power of Municipality.—While the legislature may confer the taxing power upon municipalities, it cannot confer any greater power than the state itself possesses, and must observe the restrictions and limitations of the constitution prohibiting any exemption from taxation save in consideration of pub-

lic service, unless it be of a benevolent or charitable character. *Walker v. Richmond* (Ky.) 1918E-1084. (Annotated)

3. Taxing one district for benefit of another.—Ordinarily the property of one district cannot be taxed if it clearly appears that the tax is for the exclusive benefit of another district. *Keith v. Lockhart* (N. C.) 1918D-916.

4. What constitutes "necessary expense."—A county fence of the character required by the fence law is not a "necessary expense" within Const. art. 7, § 7, prohibiting counties from contracting debts or levying taxes except for "necessary expenses;" such term applying to ordinary and usual expenditures reasonably required by the functions of the county. *Keith v. Lockhart* (N. C.) 1918D-916. (Annotated)

2. Assessment and Valuation.

a. Assessors.

5. Nature of duties.—The quasi judicial duties of an assessor end when he has completed the assessment and submitted the roll under R. S. 1908, § 5658, and transmitted his abstract of assessment to the state commission under Sess. Laws 1911, p. 622, § 30, and he cannot thereafter question or change what is subsequently done by other boards acting within their jurisdiction; his duties then being altogether ministerial. *People v. Pitcher* (Colo.) 1918D-1185.

b. Valuation of Property.

6. Patented mines.—Under Const. art. 10, § 1, as amended in 1906 (see St. 1907, p. 501), to provide that, as to unpatented mines and mining claims, the proceeds alone should be assessed and taxed, and that patented claims shall be assessed at not less than \$500, except when \$100 in labor has been actually performed thereon during the year, in addition to the tax upon the net proceeds, a patented mine cannot be assessed at less than \$500 if no labor has been performed, and a patented mine on which labor has been performed is exempt from taxation except on the proceeds thereof, and, in the absence of any saving clause, an assessment at \$10 per acre under St. 1905, c. 58, pursuant to article 10, § 1, prior to the amendment of 1906 was invalid. *Wren v. Dixon* (Nev.) 1918D-1064.

7. Property of railroad.—A railroad, for the purpose of assessment and taxation, is considered as an entity, and includes all property that is held and used principally in the operation of the road and carrying on the business of transportation. *Chicago, etc. R. Co. v. Box Butte County* (Neb.) 1918D-1037.

8. Assessment of "roadway."—The term "roadway" as used in a statute providing that the roadway of a railroad company shall be taxed on a mileage basis, means so much of the right of way as is used for the laying of the main tracks and does not include sidings and roundhouse grounds. *Grand*

Trunk Pac. R. Co. v. Calgary (Can.) 1918D-724. (Annotated)

9. **Assessment of "right of way."**—The expression "right of way and depot grounds" in section 6375, Rev. St. 1913, was not intended to exclude from the jurisdiction of the state board in assessing railroads all property situated more than 100 feet from the center or the main track of the road. Chicago, etc. R. Co. v. Box Butte County (Neb.) 1918D-1037. (Annotated)

10. **Property of railroad assessed locally.**—Eleven miles of fence on leased land not assessed by the state board may also be locally assessed. Chicago, etc. R. Co. v. Box Butte County (Neb.) 1918D-1037.

11. A large quantity of steel rails not shown to be intended for repair of the road in this state, and not assessed by the state board, may be assessed locally. Chicago, etc. R. Co. v. Box Butte County (Neb.) 1918D-1037.

12. The construction in Adams County v. Kansas City & O. R. Co. 71 Neb. 549, of that part of the revenue law (Rev. St. 1913, § 6375) which specifies property to be assessed locally is adhered to. Chicago, etc. R. Co. v. Box Butte County (Neb.) 1918D-1037.

13. **Decision of state board of equalization.**—The state board of equalization in assessing a railroad acts in a quasi judicial capacity. In doubtful cases its determination as to whether a particular article of property is a part of the railroad entity is to be considered by local assessors. Chicago, etc. R. Co. v. Box Butte County (Neb.) 1918D-1037.

c. Description of Property.

14. **Abbreviations.**—The description in an assessment roll of eight acres designated as the "NE of SE $\frac{1}{4}$ and SE of NE $\frac{1}{4}$ " omitting the " $\frac{1}{4}$," was an abbreviation permitted by L. O. L. § 3598, permitting an abbreviation in the description of lands assessed, as anyone reading the description could not fail to understand what land was assessed, and, at most, it was a mere irregularity. Smith v. Dwight (Ore.) 1918D-563.

d. Proceedings to Enforce.

15. **Defenses.**—When mandamus is resorted to, to compel the assessment or collection of taxes, the respondent may defend on the ground of satisfaction, impossibility, or want of jurisdiction; but it is not a good return to plead irregularities in prior proceedings, another remedy, or a custom not authorized by law. People v. Pitcher (Colo.) 1918D-1185.

e. Review by Boards of Equalization.

16. **Necessity of hearing.**—In the absence of statutory requirements, the board of equalization, or even officers who make original assessments, may act upon their own knowledge and judgment in fixing values, so that their orders are not invalid for failure

to take testimony and have a hearing as to value. People v. Pitcher (Colo.) 1918D-1185.

17. **Raising assessment.**—Under Sess. Laws 1915, p. 163, § 15, creating a board of equalization and empowering it "to adjust, equalize, raise or lower the valuation of real and personal property of the several counties of the state and the valuation of any item or items of the various classes of such property, to the end that all the taxable property in the state shall be assessed at its full cash value, . . . provided that the state board shall have no power of original assessment," it is within the power of such board to raise the assessments returned by the various county assessors to the full cash value of the property, provided that the aggregate for the entire state so raised shall not exceed the aggregate reported by the various county assessors. People v. Pitcher (Colo.) 1918D-1185.

18. **Due process of law.**—Rev. St. 1908, § 5573, requires the assessor to furnish blanks upon which every citizen shall return to him the true value of his property, and requires the assessor to determine for himself the value of each item after examination of the schedule. Section 5575 states the manner in which certain classes of property shall be scheduled. Section 5614 provides that no failure of the owner to return property for assessment or to procure errors to be corrected and no irregularity, error, or omission in the assessment of property or the levy of the tax shall effect the legality thereof. Section 5615 provides the manner of listing an assessment when the owner is unknown. Section 5639 provides for appeal to the assessor by an aggrieved taxpayer and requires notice by the assessor to all taxpayers of changes in the assessed valuation. Section 5636 provides that the state board of equalization shall on reasonable notice to the assessor, after summary hearing, require him to make corrections and additions to an assessment found to be too low, and provides for an appeal from a decision of the board. Session Laws 1915, provides for state board of equalization whose duty shall be to adjust, equalize, raise, or lower the valuation of real and personal property and of items of various classes to such property provided that it shall have no power of original assessment. It is held that the property owner has sufficient opportunity to be heard so that, when the original assessment is changed by the state board of equalization, the board's decision is not invalid as violating the due process of law clause. People v. Pitcher (Colo.) 1918D-1185.

19. **Conclusiveness.**—The order of the state board of equalization empowered to raise or lower the valuation of property is conclusive as the judgment of a quasi court in mandamus proceedings to enforce its orders against ministerial officers, and no inquiry can be had into its regularity. People v. Pitcher (Colo.) 1918D-1185.

20. The completed assessment of property for taxation, though the result of the

judgment of several agencies, is finally determined by the state board of equalization, with the exercise of whose power no court can interfere, unless its judgment is attacked by a party whose rights are affected thereby in a direct proceeding for fraud. *People v. Pitcher* (Colo.) 1918D-1185.

3. Exemptions.

a. Construction of Statutes.

(1) In General.

21. Statutes exempting property from taxation are to be strictly construed against the exemption. *New Standard Club v. McRaven* (Miss.) 1918E-274.

22. Powers to exempt from taxation are to be strictly construed in the interest of the public. *Walker v. Richmond* (Ky.) 1918E-1084.

23. Exemptions from taxation must be strictly construed, and one claiming an exemption must show it to be clearly within the spirit and intent of the exception. *Vogt v. Louisville* (Ky.) 1918E-1040.

24. Burden of proof.—One claiming to fall within a statute exempting property from taxation has the burden of proof. *New Standard Club v. McRaven* (Miss.) 1918E-274.

(2) Property Used for Educational, Charitable or Religious Purposes.

25. Social club.—Code 1906, § 4251, par. d, exempts from taxation all property, real or personal, belonging to religious or charitable societies and used exclusively for the purposes of such societies and not for profit. A social club, the main purpose of which was to furnish diversion for the members, their families and friends, and which maintained a clubhouse for that purpose, but incidentally dispensed charity to the members and outsiders, claimed that its property was exempt. It is held that such club did not fall within such section and its property was subject to taxation. *New Standard Club v. McRaven* (Miss.) 1918E-274. (Annotated)

26. Under Code 1906, § 4252, exempting from taxation the property and revenues of any religious, charitable, or benevolent society on the lodge system, where no dividends are declared, a social club which collects dues and devotes part of them to charitable purposes, but is not run on the lodge plan, cannot escape taxation. *New Standard Club v. McRaven* (Miss.) 1918E-274. (Annotated)

27. Masonic lodge.—A lodge of Knights Templar which owns real estate and a building thereon and rents the rooms for lodge and religious purposes is not a purely public charity within the exemption from taxation in Const. § 170, though it distributes sums of money to its members and occasionally makes donations to others, when such donations are drawn largely from the money in the treasury exceeding the needs of the lodge, which has no general public charitable

purpose. *Vogt v. Louisville* (Ky.) 1918E-1040. (Annotated)

(3) Public Utilities.

28. Property used in connection with municipal lighting plant.—Where a city owns a tract of sixty acres, through which the Boardman river meanders, and upon the lower twenty acres of the tract maintains a dam, pond and water power plant for the production of electric current, the remaining forty acres of the tract not being used other than to be burdened to some extent by the water backed up by the dam, the entire tract is used for a public purpose, rendering it exempt from taxation, and such exemption is not restricted to the twenty-acre portion actually utilized by the dam, plant, and pond. *Traverse v. Blair Tp.* (Mich.) 1918E-81.

29. Municipal lighting plant.—Where a city owns and operates an electric lighting plant for the purpose of the city's use and to sell current for light and power to citizens, the enterprise is not a private business, but is a "public utility" within the provision of Comp. Laws 1897, § 3830, subd. 3, amended by Pub. Acts 1911, No. 174, exempting from taxation lands owned by a city used for public purposes. *Traverse v. Blair Tp.* (Mich.) 1918E-81. (Annotated)

30. Where such plant is located in defendant township beyond the boundaries of the city, such exemption is not affected by the fact that being so located exemption of the plant would, without compensating benefits, unequally lessen the taxable property of one municipality for the benefit of another, since the exempting language of such section is general and without distinction as to location. *Traverse v. Blair Tp.* (Mich.) 1918E-81. (Annotated)

31. That such exemption will result in unjust or unequal taxation as between such city and township clothes the court with no power to correct such injustice, since in matters of taxation the determination of the legislature in that respect is conclusive. *Traverse v. Blair Tp.* (Mich.) 1918E-81. (Annotated)

32. The Home Rule Act (Pub. Acts 1909, No. 279) as amended by Pub. Acts 1913, No. 5, and by Pub. Acts 1915, No. 210, does not restrict the application of the general exemption provision in the Tax Law, so as to except from exemption public utilities generally owned by municipalities and located outside their corporate boundaries, since the provision of the home rule act, as so amended, with regard to taxation, applies only to transportation property. *Traverse v. Blair Tp.* (Mich.) 1918E-81. (Annotated)

b. Power of Municipality.

33. A municipal corporation has no inherent power to exempt from taxation property which it is authorized to tax by its charter. *Walker v. Richmond* (Ky.) 1918E-1084. (Annotated)

4. Collection of Taxes.

34. Power of city to compromise suit.—A municipality cannot compromise a tax suit. *Walker v. Richmond* (Ky.) 1918E-1084.

5. Lien for Taxes.

35. Misnomer of landowner.—In a tax foreclosure procedure, the names "Lewis" and "Louis," under common usage and pronunciation, are "idem sonans," which rule is that, if two names, although spelled differently, sound alike, they are considered as the same, and which holds if the attentive ear finds difficulty in distinguishing them when pronounced, or common and long-continued usage has made them identical in pronunciation; absolute accuracy in spelling names is not required in legal proceedings, as the law does not regard the spelling of names so much as their sound. *Smith v. Dwight* (Ore.) 1918D-563.

(Annotated)

36. Under L. O. L. § 3586, providing that no assessment shall be invalidated by a mistake in the names of the owner of real property assessed, section 3701, providing that no assessment for taxes shall be considered illegal on account of any irregularity in the changing or listing the taxes to any other name than that of the owner, and section 3710, providing that any judgment for the sale of real estate shall estop all parties from raising any objection thereto or to a tax title based thereon which existed before such judgment, and could have been presented as a defense to an application therefor, a tax foreclosure is not void because, where the true name of "Lewis" L. Smith was written on the complaint, a copy of which was served with the summons, the summons itself was directed to "Louis" L. Smith, where it was not claimed that the tax had been paid or that the property was not liable to tax levy. *Smith v. Dwight* (Ore.) 1918D-563.

(Annotated)

6. Remedy for Erroneous Taxation or Assessment.

37. Collateral attack.—While a valuation of property for purposes of taxation in a capricious or arbitrary way, through chance and guess, and without exercising any judgment, may and should, in the absence of waiver of such irregularities, be set aside, it can be done only in an appropriate proceeding, and not collaterally in mandamus to enforce the order of such taxing officials. *People v. Pitcher* (Colo.) 1918D-1185.

7. Tax Sales and Deeds.

a. Compliance with Law.

38. Assessment contrary to constitution.—Where an assessment on a patented mining claim at \$10 per acre under St. 1905, c. 58, expressly following Const. art. 10, § 1, as amended in 1902 (see St. 1901, p. 136), was void under the amendment of that section in 1906 (see St. 1907, p. 501), providing for an

assessment of such claims at \$500, with certain exceptions as to labor performed, etc., the tax sale under the assessment was void. *Wren v. Dixon* (Nev.) 1918D-1064.

39. Excessive amount of land sold.—Under L. O. L. § 3701, providing that at a tax sale the person offering to pay the amount due on each tract for the least quantity shall be the purchaser of such quantity, which shall be taken from the east side of such tract, and the remainder discharged from the lien, a sheriff's tax sale of a quarter section of land valued at \$7,000 for taxes, and interest, amounting to \$110.60, without showing that the land was offered for sale in accordance with the law or whether the eastern or what parcel was first offered, or in how many parcels or for what the several parcels were sold, in view of the finding that the purchaser was the only bidder, is inequitable and unconscionable. *Smith v. Dwight* (Ore.) 1918D-563.

40. Under L. O. L. § 3709, making a sheriff's tax deed prima facie evidence that the sale as legally conducted, the owner has the burden of proving irregularity, and his showing that an entire quarter section valued at \$7,000 was sold or liens totaling to \$110 overcomes the prima facie showing of regularity. *Smith v. Dwight* (Ore.) 1918D-563.

b. Deeds.

41. Acknowledgment and witnessing.—Under L. O. L. § 3702, providing that a sheriff's tax deed shall be recorded "without the sealing, witnessing, or acknowledgment," the recording officer is simply required to take official notice of the sheriff's signature, and it is not necessary that his deed be acknowledged or witnessed. *Smith v. Dwight* (Ore.) 1918D-563.

42. Invalidity of sale apparent on face.—A tax deed is void on its face when it shows a sale of land in a manner not authorized by statute. *Murphy v. Wilson* (N. D.) 1918E-1101.

c. Action to Quiet Title or Set Aside Sale.

43. Payment of tax as condition precedent.—Where the property of a person is subject to a tax under the law, he must conform to the requirements of equity and pay the assessment before he can successfully maintain a suit to defeat a tax title outstanding against his land. *Smith v. Dwight* (Ore.) 1918D-563.

8. Special Assessments.

a. Nature and Exercise of Power.

44. The authority to require the property specially benefited to bear the expense of a local improvement is a branch of the taxing power, or included within it, and the question as to whether the expense of making such improvement shall be paid out of the general treasury, or to be assessed upon the abutting or other property specially benefited, and if in the latter mode, whether the

assessment shall be upon all the property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is a question of legislative expediency. *Roswell v. Bateman* (N. Mex.) 1918D-426. (Annotated)

b. Nature of Improvement.

45. Sprinkling street.—The sprinkling of streets is such an "improvement" as will support a special assessment. *Roswell v. Bateman* (N. Mex.) 1918D-426.

c. Property Subject and Exemptions.

46 Power of city to grant exemption.—Under Gen. St. 1888, c. 107, in force between 1870 and 1873, acticle 6, providing that the trustees of a town may condemn land for street purposes in certain cases, and prescribing the way in which it may be done, the law then authorizing a city to require the property holder to pay the expense of building sidewalks in front of his property, a city has no authority, in consideration of an owner's setting his fence back twelve feet, to make a contract exempting the owner from the expense of building sidewalks by agreeing that the owners of the property shall never be required to build a sidewalk, and that the city itself will perpetually maintain a pavement. *Walker v. Richmond* (Ky.) 1918E-1084.

(Annotated)

d. Persons Entitled to Object.

47. Section 243 of the charter of the city of St. Paul is not in conflict with the fourteenth amendment to the Federal Constitution, because only resident owners are entitled to sign the remonstrance therein provided for. *Sullwold v. St. Paul* (Minn.) 1918E-835.

48. The words "resident owners," as used in section 243 of the charter of the city of St. Paul providing that no public improvements shall be made if sixty per cent of the resident owners remonstrate, considered and held to apply only to parties owning property on the line of the improvement and residing within the city. *Sullwold v. St. Paul* (Minn.) 1918E-835. (Annotated)

e. Mode of Assessment.

49. "Front foot rule."—An assessment for a local improvement, levied under the "front foot rule," instead of according to benefits accruing to the property assessed, does not violate the fourteenth amendment to the Constitution of the United States. *Roswell v. Bateman* (N. Mex.) 1918D-426.

(Annotated)

f. Proceedings.

50. Necessity of hearing.—Where an assessment levied for a street improvement can only be enforced by the filing of a notice of lien, and foreclosing the same in the same manner that mortgages on real estate are foreclosed, and as such foreclosure can on-

ly be had upon notice to the property owner, there is no taking of property without due process of law, although neither the statute nor ordinance adopted in pursuance thereof makes provision for notice to the owner of property of the levying of assessments for street improvements. *Roswell v. Bateman* (N. Mex.) 1918D-426.

51. Judicial review.—In the award of damages and assessment of benefits where the improvement, when considered in connection with the property affected, is such that honest minds might differ, the apportionment thereof is a legislative function, and the courts will not interfere in the absence of a clear abuse of discretion. *Sullwold v. St. Paul* (Minn.) 1918E-835.

9. Succession Taxes.

52. Nature of tax.—Inheritance or succession taxes are not taxes laid upon persons or property, or, strictly speaking, taxes at all, but rather death duties, levied as exactions of the state in the course of the settlement of estate, as an incident to the devolution of title by force of its laws. *Corbin v. Baldwin* (Conn.) 1918E-932.

53. Rate of taxation.—It is error to assess an inheritance tax on property not exempt at the rate of eight per cent instead of five per cent on \$40,000, six per cent on the next \$200,000, and seven per cent on the balance. *Corbin v. Baldwin* (Conn.) 1918E-932.

54. Deduction of other taxes.—In computing the amount of an inheritance tax, there should be deducted from the total amount of the appraisal local taxes paid to the tax collector, inheritance taxes paid in another state and an income tax paid to the United States internal revenue collector. *Corbin v. Baldwin* (Conn.) 1918E-932.

55. Exemptions.—An intention to impose inheritance taxes on property devised or bequeathed to public charitable uses, and thereby divert some portion of the estate to some other public use than that within the mind or purpose of the testator, will not be deduced from language not clearly expressing or indicating such intention. *Corbin v. Baldwin* (Conn.) 1918E-932.

56. Corporation or institution receiving state aid.—The rule that a portion of a statute exempting something from the operation of the general rule prescribed by the statute should receive a strict construction is subject to limitations, and does not apply to the construction of Pub. Acts 1915, c. 332, § 3, exempting property passing to corporations or institutions receiving state aid from the inheritance tax imposed by that act. *Corbin v. Baldwin* (Conn.) 1918E-932.

57. Within Pub. Acts 1915, c. 332, § 3, exempting from inheritance taxes all property passing to or in trust for the benefit of any corporation or institution located in the state which receives state aid, educational, charitable, and other corporations which are granted exemptions from general taxation, in recognition of the devotion of

their property to public purposes, are institutions receiving state aid, and are entitled to exemption, since the word "aid," in its ordinary significance, has a broad and comprehensive meaning, and includes help and assistance of whatever kind and by whatever means or method provided, and there is nothing in the conditions and circumstances under which the statute was enacted, the subject-matter, the context, related legislation, or antecedent legislative history to restrict its meaning. *Corbin v. Baldwin* (Conn.) 1918E-932.

(Annotated)

58. The World Peace Foundation, intended to promote international peace, is a charity, and inheritance taxes will not be assessed on a devise or bequest to it. *Parkhurst v. Ginn* (Mass.) 1918E-982.

10. Income Tax.

59. Levy on income produced by interstate commerce.—The levy and assessment, under Laws Wis. 1911, c. 658, of a general income tax upon the net income of a Wisconsin corporation derived from transactions in interstate commerce, is not such a direct burden on interstate commerce as to contravene the commerce clause of Const. art. 1, § 8. *United States Glue Co. v. Oak Creek* (U. S.) 1918E-749.

(Annotated)

TAXICABS.

See AUTOMOBILES.

See CARRIERS OF PASSENGERS, 19, 20.

TEAM.

Exemption from execution, see EXECUTIONS, 3-6, 8.

TELEGRAPHS AND TELEPHONES.

1. Transmission of Messages:

- a. Limitation of Liability, 209.
- b. Actions, 209.

2. Rights and Liabilities of Telephone Companies, 210.

Federal control over telegraph lines, see INTERSTATE COMMERCE, 9.

Liability of electric company for injury to employee of telephone company, see ELECTRICITY, 5, 15, 16.

Telegraph lines and messages as interstate commerce, see INTERSTATE COMMERCE, 5-8.

1. Transmission of Messages.

- a. Limitation of Liability.

1. Effect of federal statute.—Where the plaintiff failed to receive unrepeatable death message sent between intrastate point but passing through another state en route, on account of the company's delay, he cannot
Ann. Cas. Dig. 1918C-E.—14.

recover more than the amount limited in contract; such message being interstate commerce, and Act Cong. June 18, 1910, recognizing such limitations of liability. *Western Union Tel. Co. v. Lee* (Ky.) 1918C-1026.

(Annotated.)

2. Congress, by the act to regulate commerce (Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379, as amended June 18, 1910, Act June 18, 1910, c. 309, § 7, 36 Stat. 544 [4 Fed. St. Ann. 2d ed. 337]), which provides that telegraph companies engaged in interstate commerce shall be deemed common carriers, and section 15 of which requires such companies to file with the interstate commerce commission the rates of charges and authorizes the commission to determine what shall be just and reasonable rates and what regulations or practices are fair and reasonable, occupied the field of regulating interstate commerce by telegraph, and a provision of a contract limiting the liability of the company for an interstate message, which has not been disapproved by the commission, is binding and prevents recovery of the statutory penalty for error in transmitting which causes delay in delivery, imposed by Code 1904, § 1294h, cls. 5 and 6. *Western Union Tel. Co. v. Bolling* (Va.) 1918C-1036.

(Annotated)

3. Presentation of claim.—In action for damages caused by failure to deliver telegraph message, defense that claim was not presented within sixty days, as required by contract, was without merit, where plaintiff presented claim within sixty days after learning of company's default. *Western Union Tel. Co. v. Lee* (Ky.) 1918C-1026.

b. Actions.

4. Persons entitled to recover for delay of telegram.—Both the sender and receiver of telegram may recover damages for delay in delivering message. *Western Union Tel. Co. v. Lee* (Ky.) 1918C-1026.

5. Evidence.—In an action against a telegraph company for failing to deliver a message offering plaintiff a personal service contract, plaintiff's testimony that he would have accepted the offer if message had been delivered is admissible. *Pfeister v. Western Union Tel. Co.* (Ill.) 1918D-738.

(Annotated)

6. Questions for jury.—Plaintiff's testimony that he would have accepted a personal service contract if the telegram containing it had been delivered by defendant makes such issue one for the jury. *Pfeister v. Western Union Tel. Co.* (Ill.) 1918D-738.

(Annotated)

7. Whether plaintiff exercised reasonable diligence in reducing his loss after defendant telegraph company failed to deliver an offer to play baseball is held to be a jury question. *Pfeister v. Western Union Tel. Co.* (Ill.) 1918D-738.

8. Plaintiff's testimony that he would have accepted a personal service contract if the telegram containing it had been delivered by the defendant, and that he had been unable to secure employment, etc., makes proximate cause of plaintiff's damages a jury question.

Pfiester v. Western Union Tel. Co. (Ill.) 1918D-738. (Annotated)

9. Recovery for mental anguish.—In action for failure to deliver a death message transmitted between intrastate points but passing through another state en route, the plaintiff cannot recover for mental suffering; such message being interstate commerce, and Act Cong. June 18, 1910, not permitting such recovery. Western Union Tel. Co. v. Lee (Ky.) 1918C-1026. (Annotated)

2. Rights and Liabilities of Telephone Companies.

10. When payment due.—Where a contract for telephone service provided that by paying an additional fee a subscriber could pay his quarterly rental during the second instead of the first month, the subscriber was not in arrears at the time of removal of the telephone during the first month. Harbaugh v. Citizens Telephone Co. (Mich.) 1918E-117.

11. Damages for wrongful discontinuance of service.—In the absence of evidence that a telephone company acted recklessly, negligently, or maliciously in removing the plaintiff's telephone and interrupting his service he cannot recover punitive damages, but it limited to actual damages for annoyance and inconvenience actually suffered. Harbaugh v. Citizens Telephone Co. (Mich.) 1918E-117. (Annotated)

12. Evidence as to comparative profits before, during and after interruption of telephone service, is admissible under proper safeguards in an action for damages for such interruption. Harbaugh v. Citizens Telephone Co. (Mich.) 1918E-117.

13. The question whether the plaintiff suffered loss of profits from interruption of his telephone service is for the jury. Harbaugh v. Citizens Telephone Co. (Mich.) 1918E-117.

TENANT.

See LIFE ESTATES; LANDLORD AND TENANT; TENANTS IN COMMON.

TENANTS BY ENTIRETIES.

Interest as subject to execution, see EXECUTIONS, 1.

TENANTS IN COMMON.

1. Grant of easement by one tenant.—A tenant in common, by deed to which the other tenants were strangers, may not place the burden of a right of way on the estate so held in common, and make it servient to some other land. Silverman v. Betti (Mass.) 1918C-90. (Annotated)

TENDER.

See PAYMENT, 1, 2.

Offer as synonymous with tender, see SALES, 3.

Reasonableness of tender of fare, see CARRIERS OF PASSENGERS, 1, 2, 12.

TESTAMENT.

See WILLS.

TESTS.

Determination under contract with United States, see UNITED STATES, 1-3.

THEATERS AND AMUSEMENTS.

Joint special committee appointed by city council to arrange for Fourth of July celebration as agents of city, see MUNICIPAL CORPORATIONS, 28, 29.

Members of committee appointed by city council to arrange for Fourth of July celebration as public officers, 1.

1. Offer to baseball player.—An offer to pay a monthly sum for playing baseball is held to be an offer for the baseball season, in view of the previous negotiations between parties for a season contract and usual custom regarding such contracts. Pfiester v. Western Union Tel. Co. (Ill.) 1918D-738.

2. Injury to patron of boat livery.—Defendant is not liable for death of plaintiff's intestate, caused by sinking of a boat hired of it, in which he had gone rowing with three companions, for failure to furnish a boat which, when capsized, would float, supporting in the water four clinging passengers, as defendant did not undertake to furnish a nonsinkable boat. Clark v. Detroit, etc. R. Co. (Mich.) 1918E-1068. (Annotated)

3. In an action for damages for death of plaintiff's intestate, caused by sinking of boat, hired of defendant, in which he, with three companions, had gone rowing, where there are no eyewitnesses to the accident, but evidence shows that plaintiff's intestate had gone on water twice before trip on which accident happened, on same day and in same boat, and that on one of these occasions he and others had rocked the boat so that it dipped water, and there is no evidence that boat's hull was infirm, or that it leaked, and no other evidence showing negligence on part of defendant, it is error to refuse to direct a verdict for it. Clark v. Detroit, etc. R. Co. (Mich.) 1918E-1068. (Annotated)

4. Powers of committee.—Authorizing display of fireworks.—Under Gen. Laws 1909, c. 134, § 4, forbidding the use of fireworks for exhibition or amusement without a previous special license from the town council, or the board of police commissioners, a general committee of members of a city council, augmented, without authority, by the addition of other citizens, had no authority without a special license to arrange for a display of fireworks on the Fourth of July, or to

grant to a fireworks company any special license for the display. *Sroka v. Halliday* (R. I.) 1918D-961.

5. Injury to spectator of display of fireworks.—It is actionable negligence so to fire bombs that they will fall upon a spectator standing where he is expected to stand to view a display of fireworks. *Sroka v. Halliday* (R. I.) 1918D-961.

6. The promoters of a fireworks display, which may become a nuisance by reason of the place where and the manner in which it is conducted, may be held personally liable for damages for resulting personal injuries. *Sroka v. Halliday* (R. I.) 1918D-961.

(Annotated)

7. Liability of committee in charge.—It was the duty of the members of a committee for expending an appropriation for and arranging for a Fourth of July celebration to see that proper precautions against injury from the negligent setting off of fireworks were taken, and the fact that they did not interfere with the manner in which that was done by their agent did not affect their liability. *Sroka v. Halliday* (R. I.) 1918D-961.

(Annotated)

8. Where the members of a committee appointed by a city council to have charge of an appropriation for and the arrangements for a Fourth of July celebration, without authority thereto, augmented the committee by the addition of other citizens, and contracted with a company to furnish fireworks in a manner satisfactory to the committee, the manner of firing was under the control of the committee, who in case of danger might have forbidden the display, so that the fireworks company was not an "independent contractor," but the "agent" of such committee, in respect to their personal liability for injury resulting from negligence in the manner of setting off the fireworks. *Sroka v. Halliday* (R. I.) 1918D-961.

(Annotated)

9. Evidence.—In an action against the members of a Fourth of July celebration committee for injuries alleged to have resulted from their negligence in setting off a display of fireworks, testimony of member of committee as to whether they were set off from a good location was erroneous, where he was not qualified as an expert in fireworks displays, and he should have been asked what was done in such lot in previous years, as known to him, and might have stated the nature of any previous displays by way of comparison with the one involved, and whether any previous damage had been done. *Sroka v. Halliday* (R. I.) 1918D-961.

(Annotated)

10. In such action evidence as to the financial responsibility of the defendants' agent in setting off the display was immaterial and inadmissible, where such agent was not a party to the action. *Sroka v. Halliday* (R. I.) 1918D-961.

(Annotated)

11. Questions for jury.—In an action against the members of a Fourth of July committee for personal injury resulting from the negligent setting off of fireworks, it is held, on the evidence that whether the display was a nuisance growing out of the place

where and the manner in which it was conducted was for the jury. *Sroka v. Halliday* (R. I.) 1918D-961.

(Annotated)

12. In an action for personal injury from the alleged negligence of the members of a Fourth of July celebration committee in causing or permitting explosive aerial bombs used in a fireworks display to be sent up by their agents so as to fall on private property while unexploded, and there remain without recovery until found by a small boy, and then exploded to his injury, it is held that defendant's negligence was for the jury. *Sroka v. Halliday* (R. I.) 1918D-961.

(Annotated)

THEORY OF CASE.

Extending issue, see TRIAL, 10.

TICKETS AND FARES.

See CARRIERS OF PASSENGERS.

TIMBER.

See TREES AND TIMBER.

TIME.

For appeal, see APPEAL AND ERROR, 15.

Effect of extension of time, see BILLS AND NOTES, 1, 2; SURETYSHIP, 2, 3.

For notice of claim, see CARRIERS OF GOODS, 6-8; CARRIERS OF LIVE STOCK, 3.

Limiting time for filing claim.

TIPS.

1. Construction of anti-tipping act.—Laws 1912, c. 136, § 4, provides that any hotel, restaurant, café dining car, railroad, or sleeping car company, and the manager, officer, or agent in charge, violating the anti-tipping act or wilfully allowing it to be violated, shall be subject to a penalty for each tip allowed to be given. The section further provides that if the hotel, restaurant, etc., fail, neglect, or refuse to post the act as required, such hotel, etc., shall be subject to fine. An indictment averred that accused, being then and there the proprietor of a café and as owner and proprietor being then and there in charge, wilfully and unlawfully did fail to post the act. It is held that the indictment did not charge an offense; the first sentence of the section, which included the agent or manager in charge of hotels, etc., being restricted to the permitting of or violations of the act, and the latter imposing a penalty for failure to post the act upon the hotel, café, railroad company, etc. *State v. Angelo* (Miss.) 1918D-237.

(Annotated)

TITLE.

Abstract of, see **ABSTRACT OF TITLE.**

When title passes under sale contract, see **SALES, 1.**

Of vendor, see **VENDOR AND PURCHASER, 8-13.**

TOILET ROOMS.

Statute requiring toilet rooms for employees, see **LABOR LAWS, 2, 3.**

TORRENS ACT.

Validity and construction, see **RECORDING ACTS, 2-8.**

TORTS.

Release of joint tortfeasor, see **RELEASE AND DISCHARGE, 2-7.**

1. **Waiver of tort.**—Whenever a party has derived a pecuniary advantage from a wrong done by him, the person wronged can waive the tort and maintain an action on the contract. *Jewell v. Nuhn* (Ia.) 1918D-356.

2. A tort may not be waived and assumption maintained thereon against a wrongdoer, when the latter's estate has not been benefited thereby, as by the appropriation by him of plaintiff's property or the proceeds of the sale thereof, and evidence of such tort and damages to plaintiff therefrom, and not so benefiting the estate of defendant, should, in an action ex contractu against him, be rejected. *Parkersburg, etc. Sand Co. v. Smith* (W. Va.) 1918E-449.

TOWNS.

Meaning of "town" as used in statute authorizing formation of lighting district by unincorporated towns, see **LIGHTING DISTRICTS, 3.**

TRADE FIXTURES.

See **FIXTURES.**

TRADE UNIONS.

See **LABOR COMBINATIONS.**

TRADING STAMPS.

1. **Validity of prohibitory statute.**—Laws 1917, c. 480, creating section 1747m of the statutes, and prohibiting the issuance, in connection with the sale of any goods, any trading stamp entitling the purchaser in exchange therefor to any goods or thing of value and prescribing penalties for violation of the act is an appropriate exercise of the

police power, for the trading stamp scheme while not a "lottery" or "gaming" may be considered as having the seduction and evil of such. *Trading Stamp Cases* (Wis.) 1918D-707. (Annotated)

2. Laws 1917, c. 480, creating section 1747m, prohibiting the use of trading stamps except those having a stated cash value, etc., does not deprive persons of property or liberty without due process of law or equal protection by the imposition of such excessive penalties as to intimidate against testing its legality. *Trading Stamp Cases* (Wis.) 1918D-707. (Annotated)

3. Laws 1917, c. 480, creating section 1747m, is not unconstitutional as impairing the obligation of contract; it being prospective in its operation not affecting the use of trading stamps in connection with sales made before it went into effect. *Trading Stamp Cases* (Wis.) 1918D-707. (Annotated)

4. The provision of the act authorizing any manufacturer or dealer to issue any ticket with the sale of goods, bearing on its face a stated cash value, and redeemable only in cash at the face value in sums of 25 cents or over by the person issuing the same, does not violate constitutional principles of classification, and does not constitute an invasion of the constitutional right to the equal protection of the laws; there being a well-defined distinction between the practice condemned and those of issuing a slip, ticket, or check which bears upon its face a stated value redeemable only in cash by the person issuing them. *Trading Stamp Cases* (Wis.) 1918D-707. (Annotated)

TRANSACTION WITH DECEASED PERSON.

Competency of witness, see **WITNESSES, 7.**

TRANSCRIPT.

Transcript of record on appeal, see **APPEAL AND ERROR, 18-21.**

TRANSFER TAX.

See **TAXATION, 52-58.**

TRAVELING SALESMEN.

Carrying side line as breach of contract, see **AGENCY, 6, 7.**

TREES AND TIMBER.

Rights of life tenant as to cutting or selling timber, see **LIFE ESTATES, 2-5.**

1. **Construction of option contract.**—Where an option timber contract is silent as to when the purchaser is to commence to cut the timber, the cutting and removal must

be within a reasonable time. *Berry v. Marion County Lumber Co.* (S. C.) 1918E-877.

2. It is incumbent on the purchaser of timber under an option contract to ascertain the facts and circumstances of the situation of the parties when he purchases, and he is charged with knowledge of the proper legal construction of the contract as to the time when the cutting should commence. *Berry v. Marion County Lumber Co.* (S. C.) 1918E-877.

TRESPASSERS.

Injury to trespassing child by explosion of dynamite caps, see EXPLOSIONS AND EXPLOSIVES, 5.

TRIAL.

See ARGUMENT AND CONDUCT OF COUNSEL; CRIMINAL LAW; NEW TRIAL.

Error in submission of question to jury, see APPEAL AND ERROR, 85-88.

Right to open and close, see ARGUMENT AND CONDUCT OF COUNSEL, 1.

1. Continuance—Discretion of trial court.—An application for a continuance is addressed to the sound discretion of the trial court, and a ruling of the trial court denying a continuance will not be disturbed by the appellate court, unless an abuse of this discretion is clearly shown, but where such an abuse is manifest, especially in a capital case, it is the duty of the appellate court to interfere, in the furtherance of justice. *Morehead v. State* (Okla.) 1918C-416.

2. Order of proof.—Where, upon the record as a whole, evidence is inadmissible, the order of its introduction is immaterial. *McCue v. State* (Tex.) 1918C-674.

3. After plaintiff had had fair opportunity to assail defendant's character for truth, and had introduced his evidence in rebuttal, including impeachment thereof, his right to offer further evidence thereon after defendant had testified in rebuttal is in the sound discretion of the trial court. *Ray v. Shemwell* (Ky.) 1918C-1122.

4. Opening for further proof.—In a broker's action for commission on an exchange of properties, the court's action in opening the case and permitting the plaintiff to prove the community character of the stock exchanged after the evidence has been closed is not an abuse of its discretion. *Godefroy v. Hupp* (Wash.) 1918E-494.

5. Offer of proof—Sufficiency.—In a broker's action for a commission on a sale of properties, defendant's offer to show whether stock was community or separate property, without any offer of specific evidence or any statement as to what the witness would testify to, or any showing that the testimony would not have been corroborative, is insufficient as a predicate for error in its rejection. *Godefroy v. Hupp* (Wash.) 1918E-494.

6. Nonprejudicial statement by court.—A statement by the trial judge held not to be shown to have been prejudicial to the defendant. *State v. Wellman* (Kan.) 1918D-1006.

7. View of premises.—The trial court's refusal to permit an inspection of the premises by the jury is held not to be an abuse of its discretion in view of the length of time which had elapsed since the accident and the changes that might have taken place in the appearance of the premises. *Chambers v. Minneapolis, etc. R. Co.* (N. D.) 1918C-954.

8. Weight of testimony of party.—In deciding whether a case should have gone to the jury the truth of the plaintiff's evidence tending to sustain his right to recover must be assumed though in conflict with that of defendant. *Parker v. Power* (Md.) 1918C-604.

9. If the plaintiff's evidence is of sufficient probative force to enable an ordinary intelligent mind to draw a rational conclusion therefrom, in support of plaintiff's right to recover, it should be submitted with the other evidence to the jury for determination by them of its weight and value. *Parker v. Power* (Md.) 1918C-604.

10. Extending issue.—Where defendant saw fit to go into a certain subject in the trial court, it must be held to have given its consent to the consideration by the court of the testimony adduced on that subject. *Oregon-Washington R. etc. Co. v. Spokane, etc. R. Co.* (Ore.) 1918C-991.

11. Necessity of finding—Issue excluded by laches.—Where the defendant is barred by his laches from raising the question whether the transaction in suit was a mortgage or not, the trial court is justified in failing specifically to find on the subject. *Elling v. Fine* (Mont.) 1918C-752.

TROVER.

See CONVERSION.

TRUST DEEDS.

See MORTGAGES AND DEEDS OF TRUST.

TRUSTS AND TRUSTEES.

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- c. Concealment of Existence of Codicil, 214.
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Right of party to contract to exercise power of sale to have trust declared in his favor, see POWERS, 2.

Trustees in bankruptcy, see BANKRUPTCY, 1-3, 6.

1. Implied or Resulting Trust.

a. In General.

1. A trust may be express or implied, and it is "implied" when deducible from the transaction as a matter of intent. *Plum Trees Lime Co. v. Keeler* (Conn.) 1918E-831.

2. When resulting trust begins.—A resulting trust results from the transaction itself at the moment title passes, and no oral agreement or payments before or after the transaction will create such a trust. *Baughman v. Baughman* (Ill.) 1918E-895.

b. Consideration Furnished for Conveyance to Another.

3. Where the purchase money for land is paid by one person and title conveyed to another, the law construes such facts as constituting a resulting trust, arising not from contract or agreement, but from the acts of the parties. *Baughman v. Baughman* (Ill.) 1918E-895.

4. Purchase by wife in name of husband.—The presumption that land paid for by a man and conveyed to his wife or child is a gift or advancement does not apply to payments by a wife for lands conveyed to her husband, and if paid from her separate estate, a resulting trust may be presumed. *Baughman v. Baughman* (Ill.) 1918E-895.

(Annotated)

c. Concealment of Existence of Codicil.

5. Where an executrix procured decree of final distribution to herself as beneficiary, but failed to offer an alleged codicil for probate, the beneficiary under the codicil could not recover from her on the theory that a trust was raised in favor of such beneficiary. *Davis v. Seavey* (Wash.) 1918D-314.

d. Trust in Proceeds of Insurance.

6. Where the landlord collects insurance money on policies payable to him by insuring loss of buildings constructed by the tenant whose lease will not expire for eight years, an implied trust is raised in favor of the tenant as against the landlord in the in-

surance money. *Plum Trees Lime Co. v. Keeler* (Conn.) 1918E-831.

e. Proof of Trust.

(1) Parol Evidence Generally.

7. Facts constituting a resulting trust may be established by parol evidence. *Baughman v. Baughman* (Ill.) 1918E-895.

8. Where plaintiff agreed on foreclosure of a mortgage on defendant's land to buy in the land for the benefit of defendant and allow him to redeem on payment of amount advanced, and in that manner was enabled to secure the lands for the amount of the mortgage which was for a sum much less than the value of the lands, it appearing that other bidders were discouraged and that defendant relaxed his efforts to secure the money to buy in the property, plaintiff cannot, on the ground that the agreement was oral, repudiate the trust and take the lands free from any claim of defendant, for that would give him an unconscionable advantage. *Strasner v. Carroll* (Ark.) 1917E-306.

(Annotated)

9. Parol trust contradicting deed.—To permit a grantor to show a parol trust in himself at variance with the written terms of his deed would violate the statute of frauds. *Campbell v. Sigmon* (N. C.) 1918C-40.

(2) Sufficiency of Evidence.

10. Parol evidence to establish a resulting trust must be clear, strong, and unequivocal, and establish the payment of purchase money by alleged beneficiary beyond doubt, and if based upon declarations of a deceased person, it must be corroborated by other facts, but the evidence may be circumstantial as well as direct. *Baughman v. Baughman* (Ill.) 1918E-895.

11. In ejectment to recover land, the evidence is held to show that plaintiff bought in the land at foreclosure of a mortgage under an agreement that he should convey to defendant, the owner, on receipt of the amount advanced. *Strasner v. Carroll* (Ark.) 1918E-306.

12. Evidence of furnishing money to husband by wife from her separate estate examined, and is held not to show whether her money bought the land, or was merely used to pay off indebtedness thereon, and to be insufficient to entitle beneficiary to a decree declaring and enforcing a resulting trust. *Baughman v. Baughman* (Ill.) 1918E-895.

13. Evidence as to conversations of children with their father examined, and held to show, that while he considered that children by his first wife had some claim arising from money furnished by their mother upon the land owned at the time of second marriage, yet he considered he owned the land in his own right to dispose of as he chose. *Baughman v. Baughman* (Ill.) 1918E-895.

2. Spendthrift Trust.

14. Rights of creditors of beneficiary.—

Where a testator created a trust directing the payment of the income to his son for life, remainder to the son's children, with directions that distribution of the principal should not in any event be made within twenty-one years after the death of the son, and that every payment of the income or principal should be made personally to the persons to whom they were given or devised, or upon their order, free from the interference or control of creditors, and never by way of anticipation or assignment, creditors of a beneficiary, who had been discharged as a bankrupt, cannot reach his interest in the principal or income, the trust being a valid spendthrift trust. *Boston Safe Deposit, etc. Co. v. Collier* (Mass.) 1918E-962. (Annotated)

3. Rights, Powers and Liabilities of Trustee.

a. Sale of Property.

15. Proceeds of sale as income.—Where testator, after making specific bequests, devised the rest of his property in trust, and after bequeathing various annuities provided for payment of interest on a large sum to a charity, but made such payments subject to the annuities previously given, the proceeds of the sale of vacant real estate should be treated as principal, rather than as income; this being particularly true, as the income met all of the requirements of the annuities and was sufficient to make up the maximum annual payment given the charity. *Parkhurst v. Ginn* (Mass.) 1918E-982.

b. Investments.

16. Testamentary trustees, who are required to manage the estate and make payments of income to various beneficiaries, are by implication given power to invest and keep safely and productively invested the trust funds, for the testator must have known that his investments could not always continue the same. *Parkhurst v. Ginn* (Mass.) 1918E-982.

17. Stock dividends.—Under a will devising one-half of the residue of real and personal property to one in fee, and the other half in trust, with power to sell, transfer, invest, or reinvest, to pay over the income to the life tenant, with remainder over to the first devisee on her death without issue, stock distributions made on the reorganization of corporations in which the testatrix held stock, representing merely an enhancement in the value of the corporate assets from good management and the growth of trade, and not the accumulation of earnings, together with the trustees' purchase of the securities of those companies as an investment of principal assets, are a part of the corpus of the estate, rather than of the income. *Poole v. Union Trust Co.* (Mich.) 1918E-622. (Annotated)

c. Holding Fund Together.

18. Several trusts.—Where a testator de-

vises and bequeaths the rest and residue of his property in trust, directing the trustees to pay various annuities to members of his family, and then pay the income on a large portion of his estate to a charity, but directs that the specific annuities shall first be paid, the entire property should be held in one trust fund, liable first for the satisfaction of the annuities. *Parkhurst v. Ginn* (Mass.) 1918E-982.

19. Where testator's sons have not become entitled to payments of income under a particular clause of his will, and such payments depend on a contingency, the trustees will not, there being no present obligation on their part to set aside any of the income for this purpose, be required to do so, for they have a broad discretion, with which the court will not interfere. *Parkhurst v. Ginn* (Mass.) 1918E-982.

20. Where a testator, who owned a large interest in a publishing partnership, directs that on certain contingencies a number of shares, the interest of the partners being, for purposes of bookkeeping, divided into shares, shall be delivered to his two sons, the trustees, who are authorized to continue the investments in the partnership, are not bound to set aside from the general trust fund the amount of the shares to which the sons may become entitled. *Parkhurst v. Ginn* (Mass.) 1918E-982.

21. Where testator, after making various bequests, devised and bequeathed all the residue of his property to trustees, to hold in trust for payment of specified annuities, and for the payment of the income, as nearly as the trustees could conveniently reckon it, of \$800,000, not exceeding \$40,000 per year, to the World's Peace Foundation, the trustees should not set apart any of the trust property as a separate fund for the benefit of the World Peace Foundation; other parts of the will stating that the specific annuities should first be paid, and the provisions as to payment to the foundation indicating that no separate funds should be created for its benefit. *Parkhurst v. Ginn* (Mass.) 1918E-982.

22. The payment to the World Peace Foundation should be that proportionate part of the total net income of the fund which \$800,000 bears to the entire principal, but not exceeding \$40,000 annually. *Parkhurst v. Ginn* (Mass.) 1918E-982.

d. Taxes and Expenses.

23. Where investments of trust funds are subject to annual taxes, these should be paid as part of the expenses of the trust, and are to be deducted before the net income can be ascertained. *Parkhurst v. Ginn* (Mass.) 1918E-982. (Annotated)

24. The general rule is that taxes and carrying charges on real estate held by trustees for a life beneficiary are to be paid out of the income of the trust estate, and are not properly chargeable to capital account, unless the will contains unequivocal directions to the contrary. *Spencer v. Spencer* (N. Y.) 1918E-943. (Annotated)

25. Where testator recited his one-third interest in a farm, estimated to be worth \$400,000, and provided that on a sale before his death or by his executors thereafter a son should receive one-fourth of the proceeds, and gave his residuary estate in trust for investment, and to pay over the net annual income to his widow for life, and on her death to pay the net annual income to his son, and gave the widow a legacy of \$100,000, payable at once, and left him surviving his widow, a son, and grandson, and personal property valued at \$156,802.50, certain city property and a residence in Newport, it is held that the taxes and carrying expenses and assessments on the farm, which was unproductive, leaving the widow practically no net income, were payable, not only of the income, but out of the principal. *Spencer v. Spencer* (N. Y.) 1918E-943.

26. Premiums on bonds.—Under Rev. Laws, c. 150, § 15, declaring that money paid with the approval of the judge of probate to a surety on an official bond given the court may be allowed as a charge against the estate, the payments of premiums on the bonds of testamentary trustees should be made out of income, and not out of the principal. *Parkhurst v. Ginn* (Mass.) 1918E-982. (Annotated)

27. Permanent improvements.—Where a testator left the residue of his estate consisting principally of unproductive land to a son subject to the payment of annuities, legacies, and other bequests, and “also subject, if necessary, to the sale by my executors and their successors, from time to time, of portions thereof, for the payment of taxes, assessments, and expenses,” and subject to an executory limitation in the event that testator’s wife or younger daughter survived the son and his descendants, the executors being given authority to manage the estate so long as any of the charges remain in force and effect, all charges having ceased to exist except the annuity to the younger daughter, the property being owned in fee simple by the children of the son subject to the annuity and the executory limitation, the cost of permanent improvements consisting of sewer, curbing assessments, and grading, should be charged to the corpus of the trust. *Sheffield v. Cooke* (R. I.) 1918E-961. (Annotated)

28. Inheritance taxes.—Where there was no sequestration of any part of a joint trust fund, and it was all held as a unit, though a part of the income was bequeathed as a charity, and other portions to various annuitants, inheritance taxes assessed against such annuities must, in view of St. 1912, c. 678, § 1, as amended by St. 1913, c. 498, declaring that all taxes under the act shall be paid out of and be chargeable to capital, instead of net income, unless provided in a will or other instrument creating the grant, be paid out of the capital fund. *Parkhurst v. Ginn* (Mass.) 1918E-982. (Annotated)

e. Compensation.

29. Compensation of the trustees for serv-

ices in converting the unproductive real estate into personalty should be charged to the principal of the estate. *Sheffield v. Cooke* (R. I.) 1918E-961. (Annotated)

30. Where there is a fund in which all the beneficiaries are interested, the apportionment of the trustees’ compensation in making permanent improvements can be made by paying the compensation out of the principal. *Sheffield v. Cooke* (R. I.) 1918E-961. (Annotated)

31. Compensation of the trustees for services rendered in making permanent improvements on portions of the estate should be charged to the principal of the estate. *Sherfield v. Cooke* (R. I.) 1918E-961. (Annotated)

32. Although, where trustees are accustomed to pay over net income to beneficiaries each year, they are entitled to deduct the commissions which are properly chargeable against income annually before making their payments, their compensation may be charged to principal if, in the discretion of the court, the circumstances so warrant. *Sheffield v. Cooke* (R. I.) 1918E-961. (Annotated)

f. Settlement of Accounts.

33. Under Gen. St. 1902, § 383, every testamentary trustee, unless excused by the will creating the trust, must account annually to the probate court. *Hooker v. Goodwin* (Conn.) 1918D-1159.

34. On accounting by trustee under will, under Gen. St. 1902, § 383, any party in interest may question items. *Hooker v. Goodwin* (Conn.) 1918D-1159.

4. Administration of Trust.

a. Equitable Jurisdiction.

35. Change of management.—Where trustees cannot so manage a trust fund as to carry out the plain intentions of the testator under circumstances clearly not contemplated by him, a court of equity may direct a change in the management of the trust fund to carry into effect the manifest intention of the testator. *Stephens v. Collison* (Ill.) 1918D-559. (Annotated)

b. Change of Purpose or Terms of Trust

36. The court has no authority to change the title of the trust property and destroy the trust itself by compelling a beneficiary to accept a compromise settlement of pending litigation. *Stephens v. Collison* (Ill.) 1918D-559. (Annotated)

37. A court of equity may define but cannot alter a trust created by will or the powers of the trustee thereunder, except when necessary to preserve the trust from destruction; and even then it has no authority to defeat or destroy such trust. *Stephens v. Collison* (Ill.) 1918D-559.

38. A court of equity has no authority to compel a beneficiary under a will to accept a compromise settlement of a trust estate in disregard or abrogation of the terms of the

trust, notwithstanding that it would be for the best interests of all concerned, and that all other beneficiaries had consented. *Stephens v. Collison* (Ill.) 1918C-559.

(Annotated)

c. Termination.

39. Setting aside.—In an action to set aside a deed of trust executed by plaintiff after she had renounced the trust provisions of her husband's will and claimed her dower and distributable share of his estate, the effect of which deed was to relinquish substantially all that the renunciation of the will brought her, and to retain substantially the same rights in the income of her deceased husband's estate as had been given her by his will, the evidence is held to show that the deed had been procured by undue influence of the trustee in order to avoid any injury to it is a financial institution which might arise from the renunciation of the first trust. *Beard v. Beard* (Ky.) 1918C-832.

40. Right to revoke.—Where a deed or other instrument creating a trust is not revocable by the maker by its terms, and is entered into understandingly by the parties, and is not procured by undue influence or affected by fraud, it cannot be revoked by the maker without the consent of all the parties to it, nor can its terms be altered by the maker except by the consent of the cestui que trustent. *Beard v. Beard* (Ky.) 1918C-832.

41. Right of parties to terminate.—An active trust, created as a protection to the beneficiary, because of his inexperience, improvidence, inability to manage his estate, or for any other purpose not illegal which the benefactor may deem wise to carry out his intentions, must be executed, and cannot be destroyed, even by a conveyance by the trustee to the beneficiary. *Stewart's Estate* (Pa.) 1918E-1216.

TRUTH.

As defense to libel, see **LIBEL AND SLANDER**, 36-43, 48-54.

TUITION.

Compelling admission of pupil to school without payment, see **SCHOOLS**, 1.

TURNOUTS.

See **STREET RAILWAYS**, 1, 2.

TYPHOID.

Liability of water company for injuries from typhoid germs in water supply, see **WATERWORKS AND WATER COMPANIES**, 4-11.

ULTRA VIRES.

Retention of benefits by city on repudiation of ultra vires contract, see **MUNICIPAL CORPORATIONS**, 10.

UNDUE INFLUENCE.

On grantor in deed creating trust, see **TRUSTS AND TRUSTEES**, 39, 40.

On testator, see **WILLS**, 9-10.

1. "Undue influence" is a kind of mental coercion which destroys one's free agency and constrains him to do that which is against his will, and that he would not have done if left to his own judgment and volition, so that his act becomes the act of one exerting the influence rather than his own act, rendering his deed, etc., void. *Beard v. Beard* (Ky.) 1918C-832.

2. An influence, acquired by modest persuasion, arguments addressed to the understanding and appeals to the affections, not destroying free agency, does not amount to undue influence, but the influence obtained by excessive importunity, superiority of will or mind destroying free agency, etc., avoids the deed, etc., thereby procured. *Beard v. Beard* (Ky.) 1918C-832.

UNIONS.

See **LABOR COMBINATIONS**.

UNITED STATES.

As necessary party in suit to cancel deed from state where grantee relinquished title to United States, see **PUBLIC LANDS**, 15-17, 19.

Fee for collection of civil war damage claims, see **ATTORNEYS**, 6-10.

1. Determination of tests under contract.—Where a contract for five or six inch rapid fire guns contemplated the making and testing of a type gun of each caliber, and made acceptance of additional guns dependent on passage of tests by the type guns, the chief of ordnance and the secretary of war, while authorized to determine disputes, are bound to decide candidly and reasonably whether the tests were passed satisfactorily. *Saalfeld v. U. S.* (U. S.) 1918E-1. (Annotated)

2. Under a contract for furnishing the United States with wire-wound rapid fire guns of five and six inch caliber, contemplating the making and testing of a type gun of each caliber, and that the acceptance of additional guns should be dependent on the satisfactory passage of the tests of the type guns, it is held, that there was nothing to show that the secretary of war or chief of ordnance acted in bad faith or under a gross mistake in the determination of the result of the tests. *Saalfeld v. U. S.* (U. S.) 1918E-1. (Annotated)

3. In such case, it is held that the gov-

ernment by its delay did not waive its right to annul the contract, nor was that right suspended until a report should be made by experts on the technical problems involved in the construction of the gun. *Saalfeld v. U. S.* (U. S.) 1918E-1. (Annotated)

4. Additional compensation.—The cost of the last two of three unsuccessful temporary dams erected by the contractor for a public work at a place designated by the government engineer in charge, and the charges for superintendence during the time consumed in constructing them, is not chargeable to the United States, where the contract was silent as to temporary structures, and the site designated by the engineer seems to have been as good as any other, the final success on a new site having been achieved by new methods, not by change of place, there being nothing to show that the new methods could not earlier have been adopted. *U. S. v. Normile* (U. S.) 1918E-34.

(Annotated)

5. The increased cost of the necessary labor and materials for a public work, due to the breaking out of the war of 1898 with Spain, is not chargeable to the United States because of an unexplained delay on its part in notifying the contractors that they could begin work, where the notice was given in time to begin work as early as contemplated by the specifications, and the prices had advanced before the supposed neglect on the part of the government began, and the contractors had not the facilities to accumulate materials, even if they had been notified at an earlier date. *U. S. v. Normile* (U. S.) 1918E-34. (Annotated)

6. Unexpected obstacles to performance of contract.—The encountering of the stumps and roots of a submerged forest in excavating a channel for the United States does not relieve the contractor from liability under his contract to pay the stipulated liquidated damages and the additional cost of supervision and inspection in case the work is not finished in time, where the chief engineer refused to sanction any extension of time, and the contract, which makes time of its essence, provides that if completion is delayed by strikes, epidemics, quarantine restrictions, or by the "abnormal force or violence of the elements," additional time may, with the sanction of the chief engineer, be allowed, the specifications further stating that the time allowed is considered sufficient "unless extraordinary and unforeseeable conditions supervene," and warning each bidder to examine and decide for himself the character of the material to be excavated, as no allowance will be made except for the removal of such materials as "solid rock, large boulders, and compact gravel." *Maryland Dredging, etc. Co. v. U. S.* (U. S.) 1918E-32. (Annotated)

VALUE.

See EVIDENCE, 7.

Misrepresentation as to value, see FRAUD, 3-9.

Proving value of automobile, see EVIDENCE, 7.
Valuation of property for purposes of taxation, see TAXATION, 5-20, 49.

VARIANCE.

See PLEADING, 23, 24.

Effect of variance of description in decree quieting title from description in instruments on which plaintiff relied, see QUIETING TITLE, 1.

VENDOR AND PURCHASER.

1. Requisites and Validity of Contract, 218.
2. Mutual Rights and Liabilities of Parties:
 - a. Rescission of Contract, 219.
 - b. Title Called for by Contract, 219.
3. Rights of Parties against Third Persons:
 - a. Bona Fide Purchasers, 219.
 - b. Rights and Liabilities of Purchaser from Vendee in Executory Contract, 220.

See LIS PENDENS; SPECIFIC PERFORMANCE.

Sale of personalty, see SALES.

Deed by partner as contract to convey, see PARTNERSHIP, 4.

Effect of agent's deed as contract to convey, see AGENCY, 14.

1. Requisites and Validity of Contract.

1. Option contract—Right to enforce.—A contract supported by valuable consideration, which grants a party thereto the right to purchase the land of the adverse party at a fixed price per acre, provided the party makes a survey to ascertain the acreage at his own expense, and exercises the option to purchase within a specified time, and which binds the adverse party to convey a good title in the event the right to purchase is exercised within the life of the contract, is binding on both parties, enforceable at the option of the party or his assignee, if exercised by making a survey and paying the price within the time fixed. *Fields v. Vizard Invest. Co.* (Ky.) 1918D-356.

2. Time for exercise of option.—A contract, supported by a valuable consideration which binds the owner of land to convey the same to the purchaser on demand and payment of the price within a specified time, and which does not bind the purchaser to take the land at any time, and which expressly provides that the contract, unless the privilege of purchase is exercised within the specified time, shall be void, is an option to purchase at the price fixed for the definite time; and, where no offer has been made by the purchaser or his assignees to exercise the option until after the expiration of the time, the contract is not enforceable against the owner. *Fields v. Vizard Invest. Co.* (Ky.) 1918D-336.

3. A contract granted to a party thereto and his assigns the option to purchase land at a fixed price per acre, provided the party

made a survey to ascertain the acreage at his own expense, and exercised the option to purchase within a specified time, and bound the owner to convey a good title in the event the right to purchase was exercised within the time. An assignee made a survey at his own expense within the time, and notified the owner of his intention to purchase. The parties believed that there was a cloud on the title by reason of an outstanding contract, and the owner orally extended to the assignee the time of the option, to permit him to procure an assignment of the outstanding contract. It is held that, assuming that the option was validly extended for a reasonable time, the assignee, on procuring the assignment of the outstanding contract, must complete the purchase without further delay, and where he delayed a month without taking any steps to complete the purchase, he forfeited his rights under the contract and extension. *Fields v. Vizard Invest. Co.* (Ky.) 1918D-336.

2. Mutual Rights and Liabilities of Parties.

a. Rescission of Contract.

4. **Misrepresentation of location of land.**—Misrepresentations as to the location of real estate, whether made innocently or with fraudulent intent, entitle a person acquiring the land, relying upon the statements, to rescind the transaction and recover the amount paid by him on the purchase price. *Wilson v. Robinson* (N. Mex.) 1918C-49.

5. **Misrepresentation of acreage.**—Where the seller of a ranch, who had lived thereon for forty years, represented that it had about sixty acres of good bottom land, whereas in fact there were only about forty, while the bottom land was so placed that it was difficult to estimate its quantity on inspection, the buyer is entitled to rescind. *Jeffrey v. Weekley* (Ore.) 1918D-690.

6. **Effect of possession.**—Where title is defective, delivery of a warranty deed to one who has gone into possession on representation of good title under contract of bargain and sale, but providing for "apt and proper deed with covenants of general warranty," does not render the contract an executed one, so as to prevent a rescission of the contract, in the absence of waiver. *Cross v. Buskirk-Rutledge Lumber Co.* (Tenn.) 1918D-983.

(Annotated)

7. In a suit by a purchaser for rescission of contract of sale, the fact that the purchaser remained in possession of the property after tender to the vendor by way of rescission is matter merely addressed to the court in adjusting the rights of the parties in relation to rents, improvements, interest, or the like, and such retention of possession does not necessarily defeat the claim of rescission. *Jeffreys v. Weekley* (Ore.) 1918D-690.

b. Title Called for by Contract.

8. **Excessive demands.**—It is not a valid acceptance of an option on the "Eagle Block" to demand a deed with a description includ-

ing all the party wall and part of the adjoining block. *Weadock v. Champe* (Mich.) 1918C-874.

9. One given an option on the Eagle Block, which with the adjoining building has party wall rights in the separating wall; unevicenced, however, by any recorded agreement, cannot by his acceptance demand a deed providing that it is subject to existing recorded party wall agreements; thus excluding all party wall-rights for which there is no agreement of record. *Weadock v. Champe* (Mich.) 1918C-874.

10. One given an option on the Eagle Block, a building separated by party walls from buildings on each side, is not entitled to have in his deed an erroneous alternative description contained in the deed to the seller. *Weadock v. Champe* (Mich.) 1918C-874.

11. **Deed reciting implied rights.**—One given an option on a building cannot object to the deed tendered because of a recital of party wall rights of the parties that would have been implied without such provision. *Weadock v. Champe* (Mich.) 1918C-874.

12. **Notice of outstanding leases.**—Defendant, who gave plaintiff an option on a building, having delivered to him for examination the existing leases thereon, and he having retained them for some time and expressed himself satisfied therewith, the deed tendered by the defendant is not objectionable because of the provision making it subject to existing tenancies, though the leases are not recorded. *Weadock v. Champe* (Mich.) 1918C-874.

13. **Title depending on parol.**—Under a contract for, a warranty deed, delivery of a warranty deed, where the title of the grantor depends on parol evidence of adverse possession, is not sufficient to render contract executed, in absence to waiver, because title must be good as founded on the records, and not on facts not of record. *Cross v. Buskirk-Rutledge Lumber Co.* (Tenn.) 1918D-983.

3. Rights of Parties against Third Persons.

a. Bona Fide Purchasers.

14. **Purchase of equitable title.**—The defense of bona fide purchaser without notice is not applicable to the purchase of an equity only in land. *Tobey v. Kilbourne* (U. S.) 1918C-470.

(Annotated)

15. The purchaser of the equitable interest of the mortgagee of a part owner of timber lands standing in the name of a timber company purchased at his peril, acquiring the property burdened with every prior equity, more especially where the purchase was under judicial sale, since the doctrine which protects bona fide purchasers without notice is applicable solely to purchasers of legal titles. *Thomas v. Scougale* (Wash.) 1918C-452.

(Annotated)

16. Generally, the equity of an innocent purchaser cannot be asserted without the ownership of a legal title, but a bona fide purchase for value and without notice of

what constitutes the legal title is a defense to a suit to enforce a paramount equitable title. *Hennessy v. Blair* (Tex.) 1918C-474. (Annotated)

17. Purchaser of fraudulent patent.—A transfer of a certificate for public land was forged, but the transferee obtained a patent from the state, and then conveyed the land to a third person without actual notice of the fraud. There was nothing on the face of the patent or in the record of the land office giving notice that the patent was fraudulently obtained. An inquiry would have disclosed a holding by the patentee and his grantees for many years during which there was no claim, but ownership by the holder of the certificate or his heirs. It is held that, as under the doctrine of bona fide purchase the patent constituted "title," the rights of the bona fide purchaser could not be overthrown by the heirs of the owners of the certificate. *Hennessy v. Blair* (Tex.) 1918C-474.

18. Reformation.—No reformation can be made in the description contained in a deed to property which has passed into the hands of a bona fide purchaser for value without notice. *Robertson v. Smith* (Mich.) 1918D-145. (Annotated)

19. Notice of prior rights.—Where an innocent purchaser for value without notice has knowledge that the barn of an adjoining owner projects slightly over the boundary line, he is charged with notice only of such owner's claim to the land actually occupied. *Robertson v. Smith* (Mich.) 1918D-145. (Annotated)

20. Constructive notice of fraud.—To affect a bona fide purchaser for value of land with constructive notice of fraud by his predecessor, the means of knowledge must be such that it was gross or culpable negligence not to acquire the knowledge; it not being sufficient that he could have obtained the knowledge by prudent caution. *Tobey v. Kilbourne* (U. S.) 1918C-470.

21. Burden of proof.—In a suit to set aside a conveyance for fraud, the burden of proving the defense of bona fide purchaser is on the defendant. *Tobey v. Kilbourne* (U. S.) 1918C-470.

b. Rights and Liabilities of Purchaser from Vendee in Executory Contract.

22. In a suit to recover land from the assignee of the original purchaser because of fraud in procuring the contract, the evidence is held to sustain a finding that the assignee had no notice of the fraud at the time he paid the consideration therefor. *Tobey v. Kilbourne* (U. S.) 1918C-470.

23. Subsequent acquirement of legal title.—Where a contract for the purchase of land was procured by fraud, but was assigned to an innocent purchaser, and by agreement of all the parties the deed was made directly to the assignee, he can defend as a bona fide purchaser, the same as if the deed had been made to the original purchaser and the land then conveyed to the assignee. *Tobey v. Kilbourne* (U. S.) 1918C-470.

VENUE.

Where offense of introducing liquors into state committed, see INTOXICATING LIQUORS, 9.

1. Action for libel.—A civil action for libel being a transitory action, and maintainable wherever jurisdiction of the person of the guilty parties can be obtained, there was nothing to prevent plaintiff bringing both actions in the same circuit court, though in one action he sought damages only for the circulation of the libel in Wisconsin, and in the other action disclaimed as to such damages, especially as the fraternal order, if it authorized or ratified the acts of its agent, was jointly responsible for his acts. *Morse v. Modern Woodmen of America* (Wis.) 1918D-480.

2. Change.—Where municipality is party. —Under Act March 18, 1909 (P. L. 37), § 1, par. 4, relating to change of venue in cases to which the county or a municipality therein is a party and local prejudice is shown, and paragraph 5, relating to change of venue where a large number of the inhabitants of the county have an interest adverse to the applicant, a party is not entitled to a change of venue, unless it is shown to the court that a fair and impartial trial cannot otherwise be had. *Pennsylvania R. Co. v. Reading* (Pa.) 1918E-562. (Annotated)

3. On application for change of venue in a condemnation proceeding, where the public has gained the impression that plaintiff would give the land in question to the city, and it was afterwards learned that there was a condition and the gift was not made, and there was much public discussion of the matter in the newspapers which were about evenly divided between those favoring and those criticising plaintiff, and the publications had not appeared shortly before the trial, denial of the application is not error, though in two of six proceedings by plaintiff a verdict has been rendered which was not satisfactory to plaintiff in amount. *Pennsylvania R. Co. v. Reading* (Pa.) 1918E-562. (Annotated)

4. The interest of taxpayers as such in condemnation proceedings against a city is not such "interest" adverse to the applicant for change of venue as to require such change under Act March 18, 1909 (P. L. 37), § 1, par. 5. *Pennsylvania R. Co. v. Reading* (Pa.) 1918E-562. (Annotated)

VERDICTS.

See DAMAGES, 5-10.

Excessiveness of verdict in action for libel or slander, see LIBEL AND SLANDER, 68-70.

Judgment non obstante veredicto, see JUDGMENTS, 4.

Review of verdict in appellate court, see APPEAL AND ERROR, 44-48, 51.

Right to judgment for amount of loss indicated by special verdict but not allowed in general verdict in action against licensee, see **LICENSE**, 3.

1. **Form.**—A verdict for “\$6,500, Six Thousand \$5.00 Dollars,” with affidavits of six jurors that \$6,500 was intended, is not so indefinite and uncertain as to warrant granting of new trial. *Hays v. Hogan* (Mo.) 1918E-1127.

2. **General verdict as one on each count.**—A verdict of guilty as charged upon all the counts of an indictment is a sufficient verdict on each count. *People v. Brown* (Ill.) 1918D-772.

3. A verdict of guilty as charged upon all the counts does not limit the court to the imposition of the penalty for a single offense. *People v. Brown* (Ill.) 1918D-772.

4. **Construction.**—A verdict is not to be construed as strictly as an indictment, but liberally, with all reasonable intendments in its support. *People v. Brown* (Ill.) 1918D-772.

5. **Affidavits of jurors to explain.**—Affidavits of jurors are competent to explain a clerical error in a verdict. *Hays v. Hogan* (Mo.) 1918E-1127.

6. **Finding degree of crime.**—The offense of assault with intent to kill, punishable by Pen. Code, § 285, though containing the elements of assault from simple assault to assault with intent to kill, is not divided into degrees within Code Cr. Proc. § 408, declaring that when a crime is divided into degrees the jury must find the degree, and a verdict finding accused guilty as charged under Pen. Code, § 285, is sufficient. *State v. Morse* (S. D.) 1918C-570.

7. Where, on a trial for assault with intent to kill, the court charged that, if the jury did not find accused guilty of the offense charged, they could find him guilty of assault with a dangerous weapon, or of simple assault, or not guilty, and submitted four forms of verdict, to which no exceptions were taken, a verdict of guilty as charged is not objectionable for uncertainty. *State v. Morse* (S. D.) 1918C-570.

8. **Correction of verdict.**—The affidavit of all the jurors may be received to show that by a clerical error of the jury the verdict returned in court was the opposite of the verdict unanimously agreed upon by them. *Stevens v. Montgomery*, 27 Minn. 108, distinguished. *Paul v. Pye* (Minn.) 1918E-286. (Annotated)

9. When a mistake is plainly shown, there is little room for discretion in the court to refuse to act. *Paul v. Pye* (Minn.) 1918E-286.

10. **Direction of verdict.**—In a suit on a life policy, where there is some testimony tending to prove that the policy was avoided by the insured's breach, the direction of verdict for the plaintiff is erroneous. *Gilchrist v. Mystic Workers, etc.* (Mich.) 1918C-756.

11. Where, at the close of the trial of a law action, each party moves for a directed verdict, the motion of one of the parties

being sustained, the finding of the court takes the place of a verdict by the jury and will be so treated on appeal. *Modern Woodmen of America v. Berry* (Neb.) 1918D-302.

VERIFICATION.

Waiver of verification of answer by joining issue, see **PLEADING**, 25.

VESTED RIGHTS.

Effect of adoption of constitution, see **CONSTITUTIONAL LAW**, 2.

VIEW OF PREMISES.

Discretion of trial court to refuse, see **TRIAL**, 7.

VILLAGE.

Meaning of “village” as used in statute authorizing formation of lighting districts by unincorporated towns and villages, see **LIGHTING DISTRICTS**, 3.

VIRTUAL REPRESENTATION.

See **PARTIES TO ACTIONS**, 1, 2.

VISIBILITY.

Of easement, see **EASEMENTS**, 3.

VOLUNTEER.

Injury by electric wires, see **ELECTRICITY**, 4.

VOTERS AND ELECTIONS.

See **ELECTIONS**.

VOTING CONTEST.

Rights of parties to voting contest, see **FRAUD**, 10-13, 15.

VOTING TRUSTS.

See **CORPORATIONS**, 40, 41.

WAGES.

As preferred claim against insolvent corporation, see **CORPORATIONS**, 43, 44.

Minimum wage rate for women, see **LABOR LAWS**, 4-5.

WAIVER.

- Of attachment lien, see **ATTACHMENT**, 3.
 Of error on appeal, see **APPEAL AND ERROR**, 58-64.
 Of exemption from execution, see **EXECUTIONS**, 78.
 Of forfeiture of gift by will by contest, see **WILLS**, 45, 46.
 Of forfeiture of insurance policy, see **LIFE INSURANCE**, 3.
 Of ground for annulment of marriage, see **MARRIAGE**, 14.
 Of immunity as sovereign from suit, see **INTERNATIONAL LAW**, 1, 2.
 Of indictment and trial by jury, see **CRIMINAL LAW**, 13.
 Of misnomer of city in action, see **MUNICIPAL CORPORATIONS**, 33, 34.
 Of notice of termination of lease, see **LANDLORD AND TENANT**, 17.
 Of objection to tender because not made in cash, see **PAYMENT**, 2.
 Of provision in lease against subletting, see **LANDLORD AND TENANT**, 11.
 Of requirement for proof of death of insured, see **LIFE INSURANCE**, 10, 11.
 Of right of accused to be present at trial, see **CRIMINAL LAW**, 5-10.
 Of suspension of member of beneficial association, see **BENEFICIAL ASSOCIATIONS**, 15, 16, 19.
 Of verification of answer by joining issue, see **PLEADING**, 25.
 Pleading waiver of forfeiture of insurance policy, see **INSURANCE**, 22.

WAR.

- See **ALIENS**; **ARMY AND NAVY**.
 Contingent fee for collection of civil war damage claim, see **ATTORNEYS**, 6-10.
 Frustration of voyage by war as constructive loss under marine insurance contract, see **MARINE INSURANCE**, 1.
 Title and subject matter of Montana War Defense Act, see **STATUTES**, 2, 3.

1. Appropriation by state for assisting.—Laws 1918 (Ex. Sess.) c. 21, §§ 1-14, appropriating money for aiding and assisting the United States in carrying on the present war and authorizing an expenditure of such money for the purpose of encouraging those engaged in agricultural pursuits, does not authorize the state to give or extend its credit or make gifts or donations to individuals, associations, or corporations, in violation of Const. art. 13, § 1, the right to assist the United States in war being expressly recognized as a proper and probable occasion for the use of state funds by article 12, § 12. *State v. Stewart* (Mont.) 1918D-1101. (Annotated)

2. Laws 1918 (Ex. Sess.) c. 21, §§ 1-14, appropriating money for assisting the United States in war and authorizing the issuance of bonds in excess of the constitutional limit of indebtedness, is not in violation of Const. art. 12, § 12, forbidding expenditures in excess of such amount, except for "appropria-

tions or expenditures to suppress insurrection, defend the state, or assist in defending the United States in time of war." *State v. Stewart* (Mont.) 1918D-1101. (Annotated)

3. Laws 1918 (Ex. Sess.) c. 21, §§ 1-14, does not create a "debt" within Const. art. 13, § 2, forbidding the creation of a debt without providing by irrevocable law for the levy of a tax until the indebtedness therein provided shall have been fully paid or discharged. *Stewart v. Stewart* (Mont.) 1918D-1101. (Annotated)

4. Said act is not in violation of Const. art. 5, § 35, forbidding appropriations for charitable, industrial, educational, or benevolent purposes to any person, corporation, or community not under the absolute control of the state. *State v. Stewart* (Mont.) 1918D-1101. (Annotated)

5. Nature of allowance for reimbursement.—An amount appropriated under act March 4, 1915, to repay the city of Memphis for the rental value of land taken for a navy yard during the Civil War is not a gift or bounty, but is in the nature of a debt supported by good and valuable consideration. *Moyers v. Memphis* (Tenn.) 1918C-854.

6. Effect on contracts.—A provision in a contract for the sale of goods, the deliveries to cover a period of years, that in the event of war between the nations of the respective parties delivery under the contract shall be suspended and resumed at the end of the war is void as against public policy and on the outbreak of war the contract is nullified. *Bieber v. Rio Tinto Co.* (Eng.) 1918D-583. (Annotated)

7. A construction contract is terminated by an order of the ministry of munitions made in time of war suspending the work indefinitely, such an order not being within a provision for an extension of the time to perform in case of "difficulties, impediments or obstructions." *Metropolitan Water Board v. Dick* (Eng.) 1918C-390. (Annotated)

WARDS.

See **GUARDIAN AND WARD**.

WAREHOUSEMEN.

Cold storage of food, see **FOOD**, 1-4.
 Termination of carrier's liability, see **CARRIERS OF GOODS**, 3.

WARRANTY.

See **SALES**.
 By insured, see **FIRE INSURANCE**, 5, 6.
 By insurer, see **INSURANCE**, 21; **LIFE INSURANCE**, 4-6.
 Covenants in deeds, see **DEEDS**, 8-12.

1. Germinating power of seed.—The evidence sustains a finding of the jury that in the course of negotiations with the plaintiffs the vice-president and general manager of the defendant corporation made an oral

warranty of the germinating power of seed-wheat sold them; and the effect of such warranty was not as a matter of law annulled by printed disclaimers of warranty in the letter of confirmation, invoice and shipping tags, though the contract was oral and within the statute of frauds. *Moorhead v. Minneapolis Seed Co.* (Minn.) 1918E-481.

(Annotated)

2. The vice-president and general manager of the defendant, who had general charge of its office and plant, had authority to bind it by a warranty, though the making of warranties on the sale of seed-grain was contrary to the custom of the trade. *Moorhead v. Minneapolis Seed Co.* (Minn.) 1918E-481.

(Annotated)

3. Whether the evidence sustains a finding that there was a breach of warranty in respect of the germinating power of the seed is questioned but not decided. *Moorhead v. Minneapolis Seed Co.* (Minn.) 1918E-481.

(Annotated)

4. Measure of damages.—Where there is an entire failure of germination, and therefore no crop, the measure of damages for the breach of warranty of germination is the amount paid for the seed, plus the cost of planting, plus the value of the use of the land for the cropping season, less the value of its use for a proper purpose to which it might reasonably have been put upon the ascertainment of a failure of germination, and not the value of the crop which would have been raised if the seed had been true to warranty less the cost of planting and producing. *Moorhead v. Minneapolis Seed Co.* (Minn.) 1918E-481.

(Annotated)

WASTE.

1. Placing of excavated material on lot.—Under the lease of a lot fifty by one hundred and thirty-seven feet, not generally valuable for agricultural purposes, adjacent to the tenant's lot, used by it for a grape juice factory and cold storage plant, not specifying the purposes for which it might be used, but providing that the lessee should not, under penalty of forfeiture, make or suffer any waste thereof, or any alteration therein without the lessor's consent in writing, the lessee's placing upon the lot of surface soil, sand, gravel, or rock, excavated from the adjacent lot so that the sand might be used in the concrete mixture for the cellar or basement wall, and that the gravel or rock might be readily moved and the surface soil disposed of, all of which had been removed, with the exception of twelve yards on a corner of the lot left to make a better driveway, does not constitute waste for which the lessor might forfeit the lease; "waste" being an unreasonable and improper use, abuse, mismanagement, or omission of duty touching realty by one rightfully in possession, which results in substantial injury thereto. *Moore v. Twin City Ice, etc. Storage Co.* (Wash.) 1918D-540. (Annotated)

WATERS AND WATERCOURSES.

See WATERWORKS AND WATER COMPANIES.

1. Diversion of percolating waters.—The right of a landowner to dig wells on his own land and take therefrom percolating water is qualified by the rule of reasonable user, that he may not divert it to use elsewhere to the injury of other landowners in their right of reasonable use of percolating waters in their lands. *Schenk v. Ann Arbor* (Mich.) 1918E-267. (Annotated)

2. The right of a landowner to use percolating waters is none the less qualified by the rule of reasonable user, because it is a city and is seeking water for its inhabitants. *Schenk v. Ann Arbor* (Mich.) 1918E-267. (Annotated)

3. Where a city may divert percolating waters from its land for its inhabitants without violating the rule of reasonable user, and in so doing is not harming plaintiff, it will not be enjoined; but plaintiff will be allowed damages for prior injury, with right to apply to the court in case of future injury. *Schenk v. Ann Arbor* (Mich.) 1918E-267. (Annotated)

4. Accretions.—Whether accretions have been formed from the main bank of a stream to an island in the channel or from the island to the bank is a question of material fact to be determined from the evidence, construed, of course, by reference to well-established principles governing the law of accretions. It is none the less a question of fact. *Stark v. Meriwether* (Kan.) 1918E-993.

5. Apportionment of accretions. — The proper method or rule for apportioning accretions on rivers or other bodies of water between adjoining proprietors depends upon varying circumstances and conditions so that it is impracticable to state a general rule that will apply in all cases. *Stark v. Meriwether* (Kan.) 1918E-993. (Annotated)

6. On the facts stated in the opinion, held, that the adoption of a rule of apportionment between two adjoining proprietors by which each acquires a frontage on the new shore proportional to his frontage on the old one, by an extension of the original side lines, will not be disturbed. *Stark v. Meriwether* (Kan.) 1918E-993. (Annotated)

WATERWORKS AND WATER COMPANIES.

See WATERS AND WATERCOURSES.

1. Duty as to water supply.—Where a corporation assumes practically exclusive right to provide a community with water for domestic use, it must exercise ordinary care and vigilance in furnishing and distributing at all times an adequate supply of wholesome water. *Hamilton v. Madison Water Co.* (Me.) 1918D-853.

2. While a private water company furnishing water to a town is not a guarantor

of the purity of its water or of its freedom from infection, it is bound to use reasonable care in ascertaining whether there is a reasonable probability that its water supply may be infected with a communicable disease from causes which are known to exist, or which could have been known or foreseen by the exercise of such care; and if the exercise of such care would have disclosed a reasonable probability of such infection, then it becomes the duty of a water company to adopt whatever approved precautionary measures are, under the circumstances of the case, reasonably proper and necessary to protect the community which it serves from the risk of infection. *Hamilton v. Madison Water Co. (Me.) 1918D-853.*

(Annotated)

3. It is no part of the duty of the consumer to investigate the water supply and ascertain the source of pollution; such duty resting on the company furnishing water. *Hamilton v. Madison Water Co. (Me.) 1918D-853.*

(Annotated)

4. Action for injury from impure water.—In an action by a consumer for injuries from typhoid germs in water supplied by a private water company, the plaintiff to recover must prove: (1) That the fever was contracted from the use of water furnished by defendant; (2) that the defendant was negligent in supplying contaminated water; (3) that the plaintiff exercised due care. *Hamilton v. Madison Water Co. (Me.) 1918D-853.*

(Annotated)

5. In a consumer's action against a water supply company for injuries from typhoid germs in water, it is only where it appears that the injuries were occasioned by one of two causes that the plaintiff must give proof, excluding equal probability that injury resulted from a cause other than that for which the defendant is responsible. *Hamilton v. Madison Water Co. (Me.) 1918D-853.*

(Annotated)

6. In a consumer's action against a water company, supplying water for domestic purposes, for damages for illness, it is not necessary to prove actual knowledge of the unwholesomeness of the water by defendant company to establish negligence; it being sufficient to furnish testimony tending to show that exercise of reasonable care might have disclosed condition of water. *Hamilton v. Madison Water Co. (Me.) 1918D-853.*

(Annotated)

7. Evidence.—In an action against a private water company for injuries from typhoid germs in water supplied a consumer, the consumer's burden of proof as to source of disease is satisfied by showing facts and circumstances from which it reasonably appears that drinking of such water was probable efficient cause of fever. *Hamilton v. Madison Water Co. (Me.) 1918D-853.*

(Annotated)

8. In an action against a water company for damages, evidence of company's failure to exercise reasonable care in apprehending danger and taking precautionary measures to avert it is held to be sufficient to estab-

lish negligence. *Hamilton v. Madison Water Co. (Me.) 1918D-853.*

(Annotated)

9. In a consumer's action against a water supply company for injuries alleged to be due to typhoid germs in water furnished, the evidence is held to be sufficient to justify the conclusion that the source of the consumer's illness was the water furnished by the defendant company. *Hamilton v. Madison Water Co. (Me.) 1918D-853.*

(Annotated)

10. In a consumer's action against a water company, supplying water for domestic use, for injuries from typhoid germs, evidence held insufficient to establish contributory negligence, the consumer having done what ordinarily a prudent water taker would have done under the same circumstances. *Hamilton v. Madison Water Co. (Me.) 1918D-853.*

(Annotated)

11. Question of fact.—In an action by a consumer for injuries due to typhoid germs alleged to have been in the water furnished by the defendant water company, the source of plaintiff's disease is a question of fact. *Hamilton v. Madison Water Co. (Me.) 1919D-853.*

(Annotated)

WAYBILLS.

Copies of waybills as evidence in prosecution for sale of liquor, see INTOXICATING LIQUORS, 13.

WEAPONS.

1. Accidental shooting by sportsman.—An instruction, in an action by one shot while out hunting, that a loaded shotgun was a dangerous weapon which would produce bodily injury when discharged, and that the law charged each member of a hunting party with such knowledge, and that it is the duty of each to use that degree of care such as any reasonably prudent man would use under the circumstances, correctly states the degree of care which persons are bound to use, the law requiring persons having possession of firearms to exercise the utmost care that harm may not come to others, the degree of care being commensurate with the dangerous character of the weapon. *Gibson v. Payne (Ore.) 1918C-383.*

(Annotated)

2. In an action by plaintiff who was shot while out hunting, the court charged that plaintiff was bound to establish by the greater weight of evidence that defendant carelessly and negligently shot him; that members of a hunting party must use the care and caution such as any reasonably prudent man would exercise under the circumstances; that the law charges them with knowledge that a loaded shotgun is dangerous and that it was for the jury to determine whether plaintiff, by going in front of the party, was careless or negligent. It is held that the instructions did not place upon plaintiff the burden of proving a want of contributory negligence; the instructions specifically stat-

ing, after referring to defendant's claims, that he was bound to establish them by the greater weight of evidence. *Gibson v. Payne* (Ore.) 1918C-383. (Annotated)

3. **Admissibility of evidence.**—Where the complaint of one who claimed he was negligently shot avers that defendant carelessly cocked a shotgun in his hands, defendant is entitled to rebut such claim by testimony that when he received the gun it was already cocked. *Gibson v. Payne* (Ore.) 1918C-383.

4. **Questions for jury.**—In an action by one shot while out hunting, the question whether he was contributorily negligent in preceding the hunting party into a field is held, under the evidence, to be for the jury. *Gibson v. Payne* (Ore.) 1918C-383.

5. In an action for damages for injuries received when he was struck by shot from a gun discharged by defendant, while hunting, the question of defendant's negligence is held to be for the jury. *Gibson v. Payne* (Ore.) 1918C-383. (Annotated)

WEIGHT AND SUFFICIENCY OF EVIDENCE.

See EVIDENCE.

WEIGHTS AND MEASURES.

1. **Validity of statute prescribing standard.**—The authority to prescribe a standard of weights and measures not being vested by the Constitution of the United States exclusively in Congress, it is within the power of the legislatures of the several states to enact laws fixing and regulating standard of weights and measures in all respects in which Congress has not legislated upon the subject. Section 6415, General Code, as amended March 12, 1913 (103 O. L. 139), prescribing the dimensions of the peck and lesser measures, is, therefore, valid. *Williams v. Sandles* (Ohio) 1918D-154.

(Annotated)
2. **Validity of provision for confiscation of false devices.**—The provisions of section 7965—1, General Code, authorizing the condemnation and confiscation of false or fraudulent weighing or measuring devices, are within the police power of the state, and do not contravene either the state or federal constitution. *Williams v. Sandles* (Ohio) 1918D-154. (Annotated)

WIDTH.

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WILLS.

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Attorney drawing will who is also partner of attorney for proponents of will as competent witness in proceedings to probate, see WITNESSES, 1.

Bequests to charity, see CHARITIES, 3, 4.

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Establishment of lost will, see LOST INSTRUMENTS, 6.

Expert evidence as to capacity of testator in stage of senile dementia, see EVIDENCE, 13.

Number of challenges to jurors in will contest, see JURY, 3.

Opinion evidence as to capacity of testator, see EVIDENCE, 15.

Payment of annuity from income or corpus of estate, see ANNUITIES, 2.

Proof of foreign wills, see EVIDENCE, 17-19.

1. Formal Requisites to Validity.

a. Signature of Testator.

1. **Necessity of signing in presence of witnesses.**—A testator is not required to sign his will in the presence of the witnesses, and due execution is had if he has acknowledged the instrument as his free and voluntary act and deed, though he signed it beforehand and out of the presence of the witnesses. *Flynn v. Flynn* (Ill.) 1918E-1034.

2. **Signature by another.**—A will may be executed by the testator signing his name, or acknowledging the instrument as his will, though signing through someone else. *Flynn v. Flynn* (Ill.) 1918E-1034. (Annotated)

b. Attestation.

3. An attestation clause reading, "The above and foregoing instrument, consisting of the foregoing page, was on the day and date thereof signed by T. F., the above named testator, in our presence, and declared by him to be his last will and testament, and the execution thereof to be his free act and deed, and we thereupon, at his request and in his presence, and in the presence of each other, signed our names hereto as witnesses to the said will; and we hereby declare that we believe the said T. F., at the time of signing, executing, acknowledging and witnessing the said will, to be of sound mind and memory, and that the same was his free and voluntary act and deed," is held to cover all the requirements of the statute, and to be prima facie evidence of due execution of the will. *Flynn v. Flynn* (Ill.) 1918E-1034.

4. Effect of failure to remember transaction.—An attestation clause, which the attesting witnesses to the will swear bears their signatures, is competent evidence to establish due execution of the will in chancery, when the only defect in the proof is that the subscribing witnesses are unable to recollect that all the formalities prescribed by statute and recited in the attesting clause were actually complied with. *Flynn v. Flynn* (Ill.) 1918E-1034. (Annotated)

2. Testamentary Capacity.

5. Delusions as to relatives.—Where a will is attacked on the ground that testator was the victim of insane delusions that his brothers had come to his house to poison and kill him; and there is evidence from which the testator might have drawn such inferences, he cannot be deemed a victim of insane delusions, for his contentions were possible, though improbable, and an instruction that evidence of such delusions can be considered merely on the soundness of his mind is proper. In re *Haslick's Estate* (Mich.) 1918D-466. (Annotated)

6. Evidence as to capacity.—In a will contest case, evidence of testator's habits, business ability and conduct at other times and places than the time of making the will, is admissible only to throw light on the question whether he was of unsound mind at the time he executed the will. In re *Haslick's Estate* (Mich.) 1918D-466.

7. Letters used in testator's divorce case twenty-five years prior to his death are inadmissible as too remote to show his lack of sound mind. *Walsh's Estate* (Mich.) 1918E-217.

8. In a will contest case, evidence held to warrant finding that at the time of the execution of the will, testator was of sound and disposing mind. In re *Haslick's Estate* (Mich.) 1918D-466.

3. Undue Influence.

9. Evidence insufficient to go to jury.—The question of undue influence should not be submitted, where there is no evidence of

undue influence other than proof that testator did not dispose of his property, as he in casual conversation declared he would. In re *Haslick's Estate* (Mich.) 1918D-466.

10. Instructions.—In a will contest in which undue influence was asserted, the proponents requested an instruction that if the jury found that the testator, being of sound mind, at various times after the execution of the will had it read over to him, and expressed no dissatisfaction therewith, and that at such times he was not under the coercion of any of the proponents, nor unduly influenced in any way, then these facts were cogent evidence tending to show that the instrument was in fact his true will. It is held that this instruction or its equivalent should have been given, where evidence as to the testator's satisfaction with the will at a time when he was entirely free from the alleged undue influence was admitted, but the jury were not told that the purpose of its admission was to show that the will was not dictated by previous undue influence. In re *Connors' Will* (Iowa) 1918C-378.

4. Revocation.

11. Destruction of copy of will executed in duplicate.—Where a will is executed in duplicate, destruction of one copy by the testator raises the rebuttable presumption of intent to revoke. *Walsh's Estate* (Mich.) 1918E-217. (Annotated)

12. In a will contest, an instruction that, if a duplicate copy was destroyed before testator handed another copy to an executrix, there can be no conclusive presumption that he destroyed the duplicate with intent to revoke, is not erroneous. *Walsh's Estate* (Mich.) 1918E-217.

13. Presumption from failure to find will.—The presumption that a will which cannot be found by proper search was destroyed by the testator animo revocandi is rebuttable by evidence of the testator's acts. In re *Keene* (Mich.) 1918E-367.

14. Declarations of testatrix.—Evidence that testatrix drew a will cutting off her husband with only \$10 "because he had robbed her," that she frequently declared that she had her affairs fixed so that her property would go to her brother's children, in whose favor the will was drawn, and that she so said on the day of her death, and that divorce proceedings against her husband were then pending, is sufficient to raise the question of fact as to whether she revoked the will which was lost. In re *Keene* (Mich.) 1918E-367. (Annotated)

15. Evidence of enmity between testatrix and person disinherited.—Where testatrix bequeathed to her husband \$10 and no more because he robbed testatrix until she "fred him out of the house," and the husband contested the will, the original of which had been lost, evidence of enmity between testatrix and contestant was admissible on the question of revocation of the lost will. In re *Keene* (Mich.) 1918E-367.

16. Sufficiency of evidence.—The evidence held to make a question for the jury whether

testator by destruction of one of duplicate wills intended a revocation. *Walsh's Estate* (Mich.) 1918E-217. (Annotated.)

5. Probate.

a. Witnesses.

17. Requiring production of subscribing witnesses.—Where it is shown that a witness to the execution of a will resides out of the state and she testified in the probate court, and no real issue is made as to the execution of the will, there is no error in failing to require that such witness be produced. *Walsh's Estate* (Mich.) 1918E-217.

b. Evidence.

18. Testimony of subscribing witness.—In proceedings to probate a will, testimony of an attesting witness that he understood all the necessary formalities, and would not have signed as attesting witness if the necessary questions had not been asked, and the will not been executed in the proper way, is competent. *Flynn v. Flynn* (Ill.) 1918E-1034. (Annotated.)

19. Testimony other than by attesting witnesses.—Under the statute of wills, as amended in 1909, other evidence than that of two attesting witnesses may be offered in support of a will in the circuit court. *Flynn v. Flynn* (Ill.) 1918E-1034.

20. Conduct of proponent.—Testimony as to conduct and statements of a proponent is properly restricted to the purpose of testing his credibility, and cannot be used as substantive testimony. *Walsh's Estate* (Mich.) 1918E-217.

21. Sufficiency.—Where a will, signed by mark, has an attestation clause showing proper execution, and the attesting witnesses testify to all the facts of execution themselves, such will is properly admitted to probate, though the witnesses cannot testify that testator personally made the mark, particularly where the attesting witnesses also signed their names to the left of testator's name and above the attestation clause, seemingly to witness the signature of the will by mark, and not as part of the attestation clause, which they also signed. *Flynn v. Flynn* (Ill.) 1918E-1034. (Annotated.)

c. Appeal.

22. Scope of issues.—On appeal to the superior court from an order and decree of the probate court admitting a will to probate, the special statutory issue as to whether the will is a valid will is the sole issue. *South Norwalk Trust Co. v. St. John* (Conn.) 1918E-1090.

d. Costs.

23. Allowance to executor.—The law does not cast upon the person nominated executor in a will the legal duty of procuring its probate; and such person, though acting in good faith, is not entitled to payment out of the fund for his services and expenses in an ultimately unsuccessful effort to probate the

will against a contest by the heir upon the ground of want of testamentary capacity, though he is successful in the first instance in securing its allowance in the probate court. *Kelly v. Kennedy* (Minn.) 1918D-164.

(Annotated.)

e. Contracts Relating to Probate.

24. Agreement to dispense with probate—Validity.—Any right of all the parties in interest set aside or disregard a will does not extend to an active trust created by a testator, which he deems proper to protect his beneficiaries, except where the will creating the trust fixes a definite duration and names the successive trustees. *Stewart's Estate* (Pa.) 1918E-1216. (Annotated.)

25. Where a will left the residuary estate in trust for testator's wife for life, and on her death to pay the income to his children in equal shares, and to the issue of any deceased child per stirpes, and directed that on the death of the last surviving child the principal should vest under the intestate laws, the widow and children, though they are the only persons in being interested in the estate, cannot prevent the execution of the trust by agreeing to cancel the will, and are not entitled to enjoin its probate. *Stewart's Estate* (Pa.) 1918E-1216.

(Annotated.)

6. Construction.

a. General Rules of Construction.

(1) Intention of Testator.

26. Courts look closely to discover and give effect to the intention of the testator. *Poole v. Union Trust Co.* (Mich.) 1918E-622.

27. In construing a will, the expressed intention of the testator must guide and govern the court, a rule which applies to every part, the clause appointing an executor not excepted. *State v. Holtcamp* (Mo.) 1918D-454.

2. Meaning of Words.

28. When the ordinary words of the English language are used in a will, they must be held to bear the customary meaning attached to them, unless a different sense can be obtained from the context, and it is not permissible to go outside of the will and show that the testator was accustomed to attach a meaning to these words peculiar to himself. *Moseley v. Goodman* (Tenn.) 1918C-931. (Annotated.)

3. Evidence in Aid of Construction.

29. Identification of devisee.—Persons entitled to a bequest given under nicknames, by which the testator habitually designated them, by extrinsic evidence may establish this fact, and upon so doing are entitled to the legacy. *Moseley v. Goodman* (Tenn.) 1918C-931.

30. Where testator knew a Mrs. T., but always called her Mrs. M., the mere fact

that he devised property to Mrs. M., plus evidence that a Mrs. M. existed whose legal name was such, did not satisfy the language of the will so as to preclude admission of testimony that testator always called another person Mrs. M., to raise a latent ambiguity. *Moseley v. Goodman* (Tenn.) 1918C-931. (Annotated)

31. A designation of a beneficiary as Mrs. M. itself requires the production of parol evidence to identify the legatee, and evidence that the testator was accustomed to call a certain person Mrs. M. is sufficient to raise the issue whether such person was intended or another. *Moseley v. Goodman* (Tenn.) 1918C-931. (Annotated)

32. Where testator devises property to Mrs. M. and to Mrs. M.'s housekeeper, the mere fact that one whose legal name is Mrs. M. had a housekeeper does not foreclose inquiry whether the testator meant another person, whom he always called Mrs. M., to whom and to whose housekeeper he was indebted for many kindnesses. *Moseley v. Goodman* (Tenn.) 1918C-931. (Annotated)

33. Although there was no evidence that a claimant was generally known as Mrs. M., it is sufficient to show the testator's meaning if there is evidence that he always called a certain person Mrs. M. *Moseley v. Goodman* (Tenn.) 1918C-931. (Annotated)

34. The evidence is held to be sufficient to show that by a legacy to Mrs. M. testator intended a Mrs. T., whom he always called by the former name. *Moseley v. Goodman* (Tenn.) 1918C-931. (Annotated)

b. Construction of Particular Provisions.

35. Estate created.—A gift by testator of the use of all his property, real and personal, to his wife for her life, creates a life estate in all property, real and personal. *Cross v. Buskirk-Rutledge, Lumber Co.* (Tenn.) 1918D-983.

36. Trust estate.—A will bequeathing the residuary estate in trust for the benefit of testator's wife for life, and on her death to pay the income to his children in equal shares, and to the issue of any deceased child per stirpes, and directing that on the death of the last surviving child the principal should vest under the intestate laws, creates a valid, well-defined, active trust. *Stewart's Estate* (Pa.) 1918E-1216.

37. Gift to class.—Statute of Descent (Hurd's Rev. St. 1915-16, c. 39), § 11, providing that whenever a devisee, being a child or grandchild of testator, shall die before testator, and no provision shall be made for such contingency, the issue of such devisee shall take the devise, applies to a devisee dying, to testator's knowledge, before the making of the will; so that a daughter of testator having died before the will was made, leaving as issue a daughter, and testator having made devises to his living daughters and such granddaughter by name, and devised the remainder in other lands to "my children," the granddaughter takes her mother's share in the devised remainder. *Kehl v. Taylor* (Ill.) 1918D-948. (Annotated)

7. Validity of Provisions.

a. Creation of Spendthrift Trust.

38. Where the right of a testator to create a spendthrift trust has crystallized into a rule of property, it should not be changed by the courts, but by the legislature. *Boston Safe Deposit, etc. v. Collier* (Mass.) 1918C-962. (Annotated)

b. Creating Presumption of Survivorship.

39. Where a testator directs that trust funds be paid as his wife's will may direct, and that he shall be deemed to have predeceased her if order of death is unknown, and the wife makes a will at the same time as her husband, reciting the power and giving the property affected thereby, the possibility that the wife might have predeceased her husband does not render the gift void, and the property passes according to the wife's will. *Matter of Fowles* (N. Y.) 1918D-834. (Annotated)

40. Giving effect to the testator's intent does not violate the rule against enlarging wills by reference to extrinsic documents which may not be authentic. *Matter of Fowles* (N. Y.) 1918D-834. (Annotated)

c. Devise to Person under Fictitious Name.

41. A devise to a person by any name, however different the name used in the will from the true name of the person, is good, provided it is shown that the name used is one by which the testator was accustomed to designate the person. *Moseley v. Goodman* (Tenn.) 1918C-931.

d. Forfeiture of Gift by Contest.

42. What contest entails forfeiture.—Where children of a testator appeal from an order admitting the will to probate, thereby raising the special statutory issue as to whether the will is valid, they violate a provision of the will that any beneficiary of the will contesting its probate or operation, or seeking to set it aside or annul it, shall forfeit the interest given such beneficiary by the will, though they attempt to conceal their purpose to contest the will by stipulating that the only questions to be determined are whether a provision in the will is void under the law against perpetuities and whether a gift of income without limitation passes an absolute estate. *South Norwalk Trust Co. v. St. John* (Conn.) 1918E-1090. (Annotated)

43. An action by a legatee to determine the true construction of a will or of any of its parts is not a breach of the ordinary provision for forfeiture in case of a contest, as the object of such an action is not to make void the will or any of its parts, but to ascertain its true legal meaning. *South Norwalk Trust Co. v. St. John* (Conn.) 1918E-1090. (Annotated)

44. Under a provision in a will for a forfeiture of the rights of any beneficiary contesting the will, a beneficiary does not forfeit his rights by bringing a contest for

which there is a reasonable ground, as the law is vitally interested in having property transmitted by will under the conditions it prescribes, and none others, and if those interested are forced to remain silent the court will be unable to ascertain the truth, and those who would profit by a will procured by undue influence or made by one lacking testamentary capacity would thereby be aided in their wrongful designs. *South Norwalk Trust Co. v. St. John* (Conn.) 1918E-1090. (Annotated)

45. Waiver of forfeiture.—Under a will providing for forfeiture in case of a contest, where all the children and beneficiaries united in a contest, they cannot waive the forfeiture on the ground that they are the only persons who can claim a forfeiture, as the condition of forfeiture is not for the benefit of the other beneficiaries, but to carry out the wishes of the testator. *South Norwalk Trust Co. v. St. John* (Conn.) 1918E-1090.

46. In such case, all of the children having forfeited all of their rights under the will, the property of the testator is intestate estate. *South Norwalk Trust Co. v. St. John* (Conn.) 1918E-1090.

8. Legatees and Devisees.

a. In General.

47. Establishment of rights of legatee.—One bringing suit to establish her right under a will has the burden of proving that she is the legatee intended. *Moseley v. Goodman* (Tenn.) 1918C-931.

b. Lapsing and Ademption.

48. Where testator gives to his wife certain property absolutely, and in a subsequent clause provides that he shall be deemed to have predeceased her if order of death is unknown, the gift does not lapse, but passes to the personal representatives of the wife. *Matter of Fowles* (N. Y.) 1918D-834. (Annotated)

c. Election.

49. Effect on right of other devisees.—Where it appears from a will that the possession of the remainderman was postponed solely for the benefit of the testator's widow, who was given a life estate, it is presumed that, on her renunciation of the life estate, the remaindermen are entitled to enter into enjoyment at once. *Scotten v. Moore* (Del.) 1918C-409. (Annotated)

50. A contention that the election by a widow, who was given a life estate under a will to take her dower interest, destroys the contingent remainders created by the will, since they could not vest until the death of the widow, and there could be no remainder without a particular estate to support it, so that testator died intestate as to the life estate, will not be sustained, where contrary to the testator's intention, and probably unsound. *Scotten v. Moore* (Del.) 1918C-409. (Annotated)

51. Where a testator gave his property to his wife for life, and after her death to his children then living, or in case of their death to their representatives, share and share alike, the evident intent of the testator was to provide first of all for his wife, and to give the property to the children as soon as his wife's interest terminated, and they are therefore entitled to the immediate possession as soon as the widow elected not to take under the will, whether their remainders are vested or contingent. *Scotten v. Moore* (Del.) 1918C-409. (Annotated)

d. Payment.

52. Time.—Where testator devises property in trust, directing his trustees to make payments of the income, the trustees, though much must be left to their discretion, should not make partial distribution of the final residue of the estate until accumulations of income will leave a fair margin of safety to protect the beneficiaries. *Parkhurst v. Ginn* (Mass.) 1918E-982.

53. Where testator, who has devised and bequeathed the bulk of his property in trust, after providing for various annuities and an annual payment to a charity, directs that when, after the payment of such gifts and legacies, a reserve of sufficient funds shall become available for distribution, certain bequests shall be paid, one of them being to an individual, such bequests should not be withheld, where the trust fund has reached such a sum that it is amply sufficient to satisfy all prior charges, and a portion of which consists of real estate, which would doubtless be sold within a reasonable time and added to the productive property; it being apparent that testator did not intend such bequests to be permanently delayed. *Parkhurst v. Ginn* (Mass.) 1918E-982.

e. Interest.

54. Interest is payable on pecuniary legacies from the time when, by the terms of the will or by rules of law, they become due and ought to be paid. *Parkhurst v. Ginn* (Mass.) 1918E-982.

55. Rate of interest.—After the happening of a contingency on which a legacy was payable, such legacy, under St. 1915, c. 151, § 2, bears interest at the rate of 4 per cent, unless the court rules otherwise. *Parkhurst v. Ginn* (Mass.) 1918E-982.

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1. Competency.**a. Interest.**

1. Draftsman of will—Partner of attorney for party.—In proceedings to probate a will, the testimony of an attesting witness, a lawyer, is not incompetent because he drew the will, while his partner tried the case in the lower court, and is attorney for proponents in the supreme court, since the interest which will disqualify a witness must be certain, direct, and immediate, showing that he will gain or lose as the direct result of the suit, and, if the testimony does not show such direct interest, the witness' interest, if any, goes merely to his credibility, and not to his competency. *Flynn v. Flynn* (Ill.) 1918E-1034.

b. Member of Grand Jury.

2. Scope of requirement of secrecy.—Comp. Laws 1897, § 11887, providing that a member of a grand jury cannot be obliged or allowed to testify in what manner he or any member voted on any question before them, or what opinions were expressed by any juror in relation to any such question, applies only to a proceeding in which an indictment was properly found, and not to deliberations concerning and resulting in an unauthorized libelous report by the grand jury. *Bennett v. Stockwell* (Mich.) 1918E-1193.

c. Privileged Communications.

3. Husband and wife—Effect of divorce.—A divorced husband cannot testify against his wife as to a confidential communication between him and his wife. *Hesdorffer v. Hiller* (Miss.) 1918E-191. (Annotated)

4. Code 1906, § 1916, providing that husband and wife may be introduced by each other as witnesses in all cases and shall be competent witnesses in their own behalf as against each other in all controversies between them, leaves the common-law rule as to the competency of husband and wife applicable to the question of a divorced husband's competency to testify against his wife in a suit in which there is no controversy between the husband and wife. *Hesdorffer v. Hiller* (Miss.) 1918E-191. (Annotated)

5. Where a husband pledged stock certificates belonging to his wife and purporting to have been indorsed by her, and was subsequently divorced from her, he was a competent witness against her as to the indorsement of the certificates, since, if she indorsed them to enable him to borrow money

upon them, she could not have deemed the transaction confidential, and a husband or wife may testify against the other after divorce if the testimony does not relate to privileged communications. *Hesdorffer v. Hiller* (Miss.) 1918E-191. (Annotated)

6. Physician and patient—Waiver by provision in insurance policy.—Comp. Laws 1897, § 10181, which prohibits disclosure by a physician of information imparted to him in his professional capacity by a patient, was amended by Pub. Acts 1909, No. 234, providing that after the decease of such patient, in a contest upon the question of admitting his will to probate, his heirs at law shall be deemed to be his personal representatives to waive the privilege. An insurance policy issued by a fraternal benefit organization provided that the insured waived her privilege relating to the disclosure by attending physicians of information obtained while acting as such. It is held that the waiver was inoperative to render a physician's testimony admissible in suit on the policy, since the Act of 1909 creates the only exception to the prohibition against physicians' testimony. *Gilchrist v. Mystic Workers, etc.* (Mich.) 1918C-756.

d. Transaction with Person Since Deceased.

7. Waiver of objection.—By cross-examining an interested party relative to conversations with a deceased person, the cross-examining party waives the right given by Gen. St. 1913, § 8378, Rev. Laws 1905, § 4663, to exclude such testimony; and the party examined may give further testimony as to such conversations at any appropriate time in the trial though not questioned relative thereto on redirect. *Stair v. McNulty* (Minn.) 1918D-201. (Annotated)

2. Examination.**a. Mode of Examination.**

8. Leading questions.—In a criminal trial, allowing leading questions to witnesses speaking through an interpreter is largely in the trial court's discretion. *People v. Brown* (Ill.) 1918D-772.

9. Refreshing memory.—While a witness can testify only to such facts as are within his knowledge and recollection, he is permitted to refresh and assist his memory by the use of a written instrument, memorandum, or entry in a book, and it is not necessary that the writing should have been made by the witness himself, or that it should have been an original writing, nor that the writing thus used should itself be admissible in evidence, provided that after inspecting the record he can speak to the facts from his own recollection. *Scovill Mfg. Co. v. Cassidy* (Ill.) 1918E-602.

b. Cross-examination.

10. As to accuracy of appraisal.—In an action for deceit in the sale of a decedent's goods by defendant, as administrator, through an agent, where defendant offered

evidence of what appeared to be the estimate of appraisers of the value of the stock, it is proper for the buyers to show by cross-examination that the appraisers placed a different value upon the goods. *Harlow v. Perry* (Me.) 1918C-37.

11. **Cross-examination of accused.**—In a prosecution for manslaughter in the operation of motor vehicles, where defendant denied all knowledge of having struck deceased, and testified that he knew nothing about it at the time, his cross-examination as to whether, when notified, he went up to find out what he was accused of, is proper. *State v. Schaeffer* (Ohio) 1918E-1137.

c. Redirect Examination.

12. **Cross-examination outside scope of direct.**—Where defendant, on cross-examination of a witness whose direct examination is confined to the identification of testimony considered by arbitrators, draws out testimony as to the award and what the arbitrators intended to decide, the cross-examination justifies redirect examination of the witness on the same subject and forecloses any objection which might otherwise have been urged to the competency of the evidence. *Oregon-Washington R. etc. Co. v. Spokane, etc. R. Co.* (Ore.) 1918C-991.

3. Credibility, Impeachment and Corroboration.

a. Credibility.

13. **The credibility of witnesses is a question for the jury.** *McCue v. State* (Tex.) 1918C-674.

b. Impeachment.

14. **Proof of character.**—To impeach defendant as a witness his character for honesty may not be shown, but only his character for truthfulness and morality. *Ray v. Shemwell* (Ky.) 1918C-1122.

c. Corroboration.

15. **Proof that testimony not volunteered.**—Where the accused attacks a witness by evidence of statements that he was going to volunteer to testify, though he knew nothing of the case, the witness may be corroborated by evidence that his name was furnished to the prosecution by another. *McCue v. State* (Tex.) 1918C-674.

16. **Proof of good reputation.**—Where a witness is a stranger, and discrediting facts have been developed in his cross-examination, he may be corroborated by proof that his general reputation for truth and veracity is good. *McCue v. State* (Tex.) 1918C-674.

17. **Where witnesses offered by the accused to prove his alibi are contradicted by the state's witnesses as to the fact of the alibi, but are not in any other way attacked, their testimony may not be corroborated by proof of their general reputation for veracity, notwithstanding the trial is held in a county where accused's witnesses are not known.** *McCue v. State* (Tex.) 1918C-674.

18. **Previous consistent statements.**—Where accused attacks the credibility of a witness offered to contradict his defense of alibi by testimony that the witness had stated to others that he knew nothing about the case, but was going to testify nevertheless, etc., the witness may be corroborated by evidence that, shortly after the killing, he made statements identical with those given at trial. *McCue v. State* (Tex.) 1918C-674.

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"Undue influence," see UNDUE INFLUENCE, 1, 2.

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"Within the house," see INSURANCE, 51.

1. **About.**—The introduction of the words "about" or "estimated" or "more or less" in a conveyance or contract for a conveyance does not afford a shield against liability for false representations as to acreage, and the mere fact that a deficiency is very large in proportion to the supposed quantity is often treated as in itself evidence of fraud or mutual mistake. *Jeffreys v. Weekly (Ore.)* 1918D-690. (Annotated)

2. **Children.**—Ordinarily, the word "children" means the immediate offspring, and does not include "grandchildren." *Lowery v. Le Flore (Okla.)* 1918E-1001. (Annotated)

3. **Consortium.**—The term "consortium" includes affection, solace, comfort, companionship, and society incidental to the marital relation, and services of the wife. *Smith v. Nicholas Building (Ohio)* 1918D-206.

4. **Continuing offense.**—A continuing offense is a transaction or a series of acts set on foot by a single impulse and operated by an unintermittent force, no matter how long a time it may occupy. *Reynolds v. State (Ariz.)* 1918D-879.

5. **Invoice value.**—Plaintiff represented that a stock of goods which he offered in exchange for other property was of the invoice value of \$12,000. It is held that the expression "invoice value" should be construed as having reference to the cost price

for which the seller invoiced the goods to the purchaser, and not to their actual value. *Knopfler v. Flynn (Minn.)* 1918E-538. (Annotated)

6. **Leg.**—In its common-law definition, the term "leg" does not include the foot, nor any of the bones of the foot. *Butler v. Eminent Household of Columbian Woodmen (Miss.)* 1918D-1137.

7. **Liquor saloon.**—A liquor saloon is a shop or room wherein is kept a varied assortment of liquors which are sold by the glass, drink or at retail. *Gibbs v. Arras Bros. (N. Y.)* 1918D-1141.

8. **Political party.**—A "political party" is an association of voters believing in certain principles of government, formed to urge the adoption and execution of such principles in governmental affairs through officers of like beliefs. *Kelso v. Cook (Ind.)* 1918E-68.

9. **Pro rata.**—In a contract for the contribution to a fund by several parties pro rata, the term "pro rata" means in proportion, proportionately, according to measure, interest, or liability of each, and never means equality or an equal division, and has no meaning unless referable to some rule or standard. *Chaplin v. Griffin (Pa.)* 1918C-787. (Annotated)

10. **Stakeholder.**—A "stakeholder" is one in whose hands money or property is deposited to abide the event of a gambling contract. *Martin v. Francis (Ky.)* 1918E-289.

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Subscription to stock: admissibility of parol evidence to show that subscription to stock was conditional, 1918C-853.

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Railroad crossings: extent of highway crossing which railroad is under duty to maintain in safe condition, 1918D-186.

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